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MASSACHUSETTS REPORTS 208

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

FEBRUARY 1911-MAY 1911

HENRY WALTON SWIFT

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1911

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HOM. HENRY NEWTON SHELDON.

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ATTORNEY GENERAL
How. JAMES MARCUS SWIFT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

MASSACHUSETTS.

Louis Monjeau vs. Metropolitan Life Insurance Company.

LOUIS MONJEAU, administrator, vs. SAME.

Bristol. October 24, 1910. — February 27, 1911.

Present: Knowlton, C. J., Hammond, Loring, Brally, & Sheldon, JJ.

Insurance, Life. Evidence, Presumptions and burden of proof, Opinion. Practice, Civil, Exceptions.

At the trial of an action on a policy of life insurance, the plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant introduced an instrument purporting to be an original application for the insurance, which the plaintiff denied was such, and an instrument which the defendant's witnesses testified was a true copy of the policy, which referred to an application and had annexed to it a copy of the application put in evidence by the defendant, but the plaintiff denied that the instrument introduced by the defendant was a true copy of the policy, and asserted that the original policy had no copy of an application attached to it. The judge refused to make certain rulings requested by the defendant based on statements contained in the application which the defendant's witnesses testified was attached to the policy. Held, that, as the question whether the application was attached to the policy was for the jury, the judge properly might refuse to make any ruling which assumed as a fact that the application was so attached.

If, at the trial of an action upon a policy of life insurance, it appears that the mother of the insured died of consumption and that the insured previously had applied unsuccessfully to another company for life insurance, and these facts are contrary to statements made by the insured in his application for the insurance, which is attached to the policy, the questions, whether either of these misrep-VOL. 208.

resentations was made with intent to deceive, or whether the risk of loss was increased by the fact that the mother of the insured died of consumption or by the fact that the insured made a previous unsuccessful application for life insurance to another company, are for the jury.

- At the trial of an action on a policy of life insurance, where the defendant contends that the policy is void because the insured made misrepresentations in the application, a copy of which is attached to the policy, it is right for the presiding judge to refuse to rule that "the burden is on the plaintiff to show affirmatively that all the statements in the application material to the risk were true," because this does not state correctly the rule of law now in force in this Commonwealth under our statutes.
- At the trial of an action on a policy of life insurance, where the plaintiff has introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant has introduced an instrument which its witnesses testify is a true copy of the policy, but this is denied by the plaintiff, and where the defendant does not put in evidence any proofs of death and there is no agreement as to the kind of proof of death required by the lost policy, and there is evidence that the defendant was satisfied with the proofs of death sent to it, whatever they were, it is right for the presiding judge to refuse to rule as matter of law that the proofs of death were insufficient.
- At the trial of an action to recover the amount of certain life insurance and also to recover certain premiums for such insurance paid in advance, which never became payable because the insured died before the dates when they were to become due, the declaration contained four counts, two upon the policy and two for the premiums prematurely paid. The plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral evidence as to the contract of insurance contained in the lost policy. The defendant introduced an instrument which its witnesses testified was a true copy of the policy, but this was denied by the plaintiff. The defendant asked the presiding judge to rule that, "if the contract between the insured and the defendant was a policy like the one put in evidence by the defendant then the plaintiff is not entitled to recover." The judge refused to make this ruling. Held, that the judge was justified in considering the ruling requested as intended to apply to the whole declaration, that being its natural interpretation, and so interpreted it clearly could not have been given in regard to the counts for the premiums prematurely paid, so that the refusal of the judge was right, whether or not the plaintiff had complied with the terms set forth in the copy of a policy which had been put in evidence by the defendant.
- At the trial of an action on a policy of life insurance, the plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant introduced an instrument purporting to be an original application for the insurance, which the plaintiff denied was such, and an instrument which the defendant's witnesses testified was a true copy of the policy, which referred to an application attached to it, but the plaintiff denied that the instrument introduced by the defendant was a true copy of the policy, and asserted that the original policy had no copy of an application attached to it. Unless the copies introduced by the defendant were true ones, there was ample evidence that the proofs of death either were satisfactory to the defendant or had been waived. The presiding judge refused to rule that the plaintiff was not entitled to recover. Held, that the refusal of the judge was right,

because the questions, what were the terms of the contract and whether they had been performed by the plaintiff or waived by the defendant, were for the jury. Testimony, that a physician told the father of a certain girl that he thought that she had the consumption at a time when an insurance policy was taken out upon her life for the benefit of her father, is no evidence that she had the consumption at that time, and only tends to show that if she had that disease the father had been informed of the fact. In the present case the jury found that the insured did not have the consumption, so that the question whether the father thought that she had or represented that she had was rendered immaterial.

Two actions of contract, the first action upon two policies of insurance for \$500 each upon the life of Olesime Comeau, the plaintiff being the assignee of the father of Olesime, Maximen Comeau, who was named as beneficiary in both of the policies, and the second action by the administrator of the estate of Olesime Comeau for the amount of the policies and also for the amount of two premiums paid in advance to the defendant upon the policies. Writs dated November 23, 1905, and December 31, 1906.

In the Superior Court the cases were tried together before *Hitchcock*, J. Such of the facts as are necessary to an understanding of the points of law involved are stated in the opinion.

At the close of the evidence the defendant asked for fourteen rufings. The last six were given as instructions by the judge or were waived or no exception was taken to the refusal to give them. The other rulings thus requested were as follows:

- "1. On the whole evidence the plaintiff is not entitled to recover.
- "2. If the mother of the plaintiff [sic] died of consumption the plaintiff is not entitled to recover.
- "8. If Olesime Comeau had applied to the John Hancock Insurance Company for insurance prior to the application to this company, and no policy was issued on said application then the plaintiff is not entitled to recover.
- "4. If the real party interested in this claim is Louis Monjeau, and he is not related to or a creditor of Olesime Comeau, but he procured this insurance to be taken on her in the hope of making money out of it, then the contract is against public policy and the plaintiff cannot recover. [Not argued and treated as waived.]
- "5. The burden is on the plaintiff to show affirmatively that all statements in the application material to the risk were true.

- "6. The burden is on the plaintiff to show affirmatively that all conditions in the policy material to the risk and to be performed by the insured or her representatives have been performed. [Given in substance.]
 - "7. The proofs of death are insufficient.
- "8. If the contract between the insured and the defendant was a policy like the one put in evidence by the defendant then the plaintiff is not entitled to recover."

The judge refused to make any of these rulings, although he was held by this court to have given the sixth in substance, and submitted the case to the jury with instructions, of which a portion is quoted in the opinion. The parties agreed that a verdict should be taken only in the second case, which was brought by the plaintiff as administrator. The jury returned a verdict for the plaintiff in the sum of \$1,256.66; and the defendant alleged exceptions. Those relating to the admissibility of evidence are described sufficiently in the opinion.

- J. M. Morton, Jr., for the defendant.
- C. R. Cummings, (J. Little with him,) for the plaintiff.

HAMMOND, J. Originally there were two actions, both brought by the same plaintiff, the first as he was assignee of Maximen Comeau the beneficiary, and the second as he was administrator of the estate of Olesime Comeau, the person whose life was insured. By the consent of the parties the actions were consolidated, and the trial proceeded as if only the second case remained, and in that case alone was the verdict rendered. The declaration contained four counts of which the first and second were each upon a policy of insurance, and the third and fourth were to recover premiums prematurely paid which by reason of the death of Olesime never became due.

At the trial the plaintiff alleged and offered evidence tending to show that both policies were lost. He was therefore allowed to put in secondary evidence of their contents. He did not put in any policy nor any alleged copy, but relied almost entirely upon oral evidence as to their provisions. This evidence was very meagre and manifestly very incomplete, and on the whole the case of the plaintiff at the time he rested presented a very skeletonlike appearance. The defendant however, so far as disclosed by the record, seemingly confident of the merits of its

defense, without calling for a ruling of the court upon the sufficiency of the plaintiff's evidence, proceeded to put in its own evidence. Among other things it put in the original application (which was for an insurance of \$1,000 upon which the two policies of \$500 each were issued) and also certain papers sworn by witnesses called by the defendant to be true copies of the The evidence that these were true copies came wholly from the defendant. The plaintiff never conceded that they were true, nor that the application was annexed to the policies or either of them, but contended to the contrary. The case of the plaintiff as it stood when he first rested was in some respects strengthened by evidence coming from witnesses called by the defendant, especially on cross-examination, and by witnesses called by him in rebuttal. At the close of the whole evidence certain requests for rulings were presented by the defendant of which eight were refused; and the case is before us upon the defendant's exceptions to this refusal and to certain rulings as to evidence. No exceptions were taken to the charge.

We have thus outlined the general course of the trial because it must be borne in mind in dealing with the exceptions. The course of the plaintiff was somewhat unusual. While he contended that he was entitled to recover even if the papers introduced by the defendant as copies of the policies were correct, still that was not the only ground upon which he based his right to recover. All through the trial he contended that the alleged copies were not true copies, and that therefore the radical question, what were the terms of the contracts, was for the jury, as well as the question whether the terms, as the jury finally should find them to be, had been complied with by the plaintiff or waived by the defendant. This position of the plaintiff is clearly set forth in the charge. The presiding judge, after saying in substance that the first question to be determined was "What was the agreement between the parties," and that it was incumbent upon the plaintiff to prove what the policies contained, by producing them if in existence and by secondary evidence if they were lost or destroyed, proceeded as follows: "The plaintiff in this case comes in and claims that the policies have been issued and that they have been destroyed or lost, and

he offers evidence consisting in part of statements made by the deceased girl, which statements are competent evidence under the statutes of this Commonwealth, to the effect that she had policies of insurance in this company, and other evidence from which he claims that he has laid before you sufficient evidence from which you can find what the nature of those policies was, the amount, and to whom payable, and invokes the general propositions of law applicable to insurance policies. Then from the other evidence which has been in the case he asks you to believe what the policies were. There has been evidence introduced on behalf of the defendant tending to show what the policies were, and there has been put in evidence here what the defendant presents as a copy of one of the policies. evidence before you for your consideration and is evidence to be taken into consideration in determining whether the plaintiff has proven what the contract was between these parties." And the same position is maintained in the plaintiff's brief and was stated in the oral argument before us.

The plaintiff further contended and asked the judge to rule that the burden of proving that a correct copy of the application was annexed to the policy was upon the defendant, and further, that "if the jury find that a correct copy of the application was not annexed to the policy," then that part of the defense which is "based on the insured's alleged fraud or misrepresentation [must] fail." It does not appear that the presiding judge made any such ruling, but the request shows the position of the plaintiff upon this point.

The second and third requests of the defendant were properly refused. R. L. c. 118, § 73, provides that "every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence." The copies of the policies introduced by the defendant contained each a reference to the application "as a part of this contract" and had annexed to it a copy of the application. But, since the question whether the application was annexed to the contract was for the jury, the short answer to these requests is that they each assume that the

application was annexed, or in other words they each assume the existence of a fact upon which the jury were to pass. But even if the policies were as the defendant contended and even if the application was duly annexed thereto, the statements made in the application would not avoid the policy unless they were made with actual intent to deceive or unless they increased the risk of loss. R. L. c. 118, § 21. We are of opinion that the questions whether the insured made the statement about the cause of her mother's death with intent to deceive, and whether the fact that the mother died of consumption increased the risk of loss, were upon the evidence for the jury. Barker v. Metropolitan Life Ins. Co. 198 Mass. 375; Kelly v. Mutual Life Ins. Co. 207 Mass, 398. Nor could it have been ruled as matter of law that the statement as to previous applications was made with intent to deceive. The jury were instructed that if the statement was made and made with intent to deceive, there would be no liability on the policies. The defendant did not contend that this misrepresentation increased the risk of loss. The question of intent in each matter was properly left to the jury. Coughlin v. Metropolitan Life Ins. Co. 189 Mass. 538. Levie v. Metropolitan Life Ins. Co. 163 Mass. 117. Hogan v. Metropolitan Life Ins. Co. 164 Mass. 448. Dolan v. Mutual Reserve Fund Life Association, 173 Mass. 197.

The exception to the refusal to give the fourth ruling requested is not argued and in view of its nature we regard it as waived.

The fifth request was properly refused. It does not state the rule of law now in force in this Commonwealth as the result of our statutes. Barker v. Metropolitan Life Ins. Co. 198 Mass. 375, 388. That case was so recently decided and the discussion, though brief, so clear, that it is necessary simply to refer to it and the cases therein cited. The present case differs materially from the case of Lee v. Prudential Life Ins. Co. 203 Mass. 299, cited by the defendant.

The sixth request was given in substance. The jury were instructed that it is incumbent upon the plaintiff "to prove that so far as... [he]... was concerned all has been done that is required on... [his]... part... to make those policies payable, and it must appear affirmatively on [his] behalf... that the premiums... have been paid, that the policy has become payable

either by the lapse of time when it should become payable, or by the death of the party insured."

The seventh request could not have been given as matter of law. It assumes that the copies produced by the defendant correctly stated the provisions of the policy as to proof of loss and as to the only way in which there could be a waiver by the defendant, an assumption the accuracy of which all along was denied by the plaintiff. One Marcotte, called by the defendant, testified that he lived in New Bedford and was an assistant superintendent of the defendant in 1903; that one "Smith was superintendent," and " had charge of all the matters here of the company." One Auger, called by the plaintiff, testified that as the attorney for the plaintiff he had called several times upon Smith; that the first time he called Smith said "there had been some mistake in making out the proofs of claim in Canada and that other blanks had been sent and that he thought in a short while everything would be all right." That there were several talks afterward between himself and Smith on the same subject, and that "the language of the talk was that everything was all right as far as he [Smith] knew." He further testified that other trouble arose, that this trouble was "concerning the lost policies"; that Smith wanted affidavits about the lost policies and some were given him; that "there was a third trouble, - Smith wanted to know" "where the girl had worked" and "where she had lived"; that the witness "got that information and gave it to him"; that subsequently Smith said "he had sent all the information on to the company and he presumed everything was all right and that we ought to be getting the check very shortly"; that several times after that Smith told him that "we ought to receive a check before long"; and that Smith also said "he presumed everything was all right, otherwise the company would have notified him about it, that as far as he knew everything was all right concerning the proofs of death, but they wanted this other thing, what became of the policies." That "that was the only thing they wanted" "at that time." Smith, although present at the trial, was not called by the defendant. The defendant did not put any proofs of death in evidence nor was there any agreement as to the kind of proofs required. The requirement of the proofs not being in evidence except by the copies, the accuracy of which was denied by the plaintiff, and there being evidence that the defendant was satisfied with those sent to it, it is manifest that the judge could not rule as matter of law that they were insufficient.

The eighth request differs from the others. It does not assume as a fact that the copies produced by the defendant are exact, but is applicable only in case the jury should find that to be the fact. In considering this request it is to be borne in mind that the declaration contained four counts of which, as above stated, the first two were upon the policies and the last two were to recover premiums prematurely paid which by reason of the death of Olesime before the time for their payment never became due. Whoever drew this request seems to have lost sight of this fact. If under all the circumstances this request could be regarded as applying only to the counts on the policies, the refusal of the judge to give it, especially in view of the provisions of the policies with reference to proofs of loss and the waiver of such proofs if insufficient, would have presented a serious question; but it cannot be interpreted in that way. The language is clear and comprehensive, and the presiding judge was justified in considering it as applicable to the whole declaration and every count thereof. It is clear that the request in its natural interpretation could not have been given.

The first request has been reserved as the last to be considered. From what has been said as to the course of the trial, especially the attitude of the plaintiff as to whether the evidence of the defendant with reference to the accuracy of the copies was to be believed and as to whether the application was annexed to the policies, it is evident that upon all the evidence the questions, what were the terms of the contract and whether they had been so far performed by the plaintiff or waived by the defendant as to make a case for the plaintiff, were for the jury.

During the trial several exceptions were taken to rulings upon the admissibility of evidence. In considering these exceptions we shall follow the order taken in the defendant's brief. The exception to the exclusion of what Dr. Bouthillier said to Maximen Comeau cannot be sustained. The jury were told that if Olesime had the consumption when the representation was made the plaintiff could not recover. The verdict shows that the jury found she did not have the consumption at that time. Even if the physician had told the father that he thought she had the consumption, it was no evidence that she had. It had no bearing upon that question at all. It tended only to show that if she had that disease the father had been informed of the fact. Inasmuch as the jury have found that she did not have the disease, the question whether the father thought she had, or represented that she had, is rendered immaterial. Whether therefore the ruling was erroneous at the time it was made it is unnecessary to consider, since the verdict of the jury shows that the defendant could have been in no way harmed thereby.

It is strenuously argued by the defendant that the judge erred in admitting the conversations with Smith, the defendant's agent at New Bedford, and in submitting to the jury the question of waiver of proofs of loss. So far as respects the question of waiver it is to be observed that the defendant took no exception to the charge, and the short answer to the defendant's contention about waiver might be that it is not properly before us so far as arising upon the charge to the jury. But, even if in view of the seventh and eighth requests for rulings, which have been hereinbefore considered, and the charge all taken together, it fairly may be contended that the question of waiver is indirectly raised, it could not have been ruled that there was no evidence of waiver. As we have said in considering the seventh and eighth exceptions, the accuracy of the defendant's copies was all along denied by the plaintiff, and it was a question for the jury what were the terms of the lost policies as to proofs of loss, and whether these terms were complied with by the plaintiff or waived by the defendant. The question of Smith's powers as agent was also for the jury, and unless the copies produced by the defendant were exact the evidence was ample, especially in view of the failure of the defendant to call Smith who was present at the trial, to show that the proofs were either satisfactory to the company or had been waived. There was evidence that Smith was the general superintendent for the defendant in New Bedford, and that he was especially acting for the defendant in this matter. We think that all conversations with him as such agent were admissible.

Several other exceptions to rulings as to evidence were taken

by the defendant. They are not argued upon the defendant's brief. They need no further notice except to say that no one of them seems sound.

Exceptions overruled.

EDMUND Y. ANTHONY, administrator, vs. New YORK, NEW HAVEN, AND HARTFORD RAILBOAD COMPANY.

Bristol. October 24, 1910. — February 27, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, Braley, Sheldon, & Rugg, JJ.

Negligence, Employer's liability, Railroad, In freight yard. Railroad.

In an action, by an administrator of the estate of a car inspector against a railroad corporation by which he was employed, for causing his death by reason of
the negligence of a conductor of a switching engine in a freight yard of the defendant in running a car against a stationary car with a disabled brake, which
the plaintiff's intestate was engaged in inspecting, and thus causing the disabled car to run over the intestate, if there is evidence warranting a finding
that the intestate rightfully was standing between the rails of a track in the
proper performance of his duty, that another car inspector was with him and
that when two inspectors were together in this way and one of them was examining a car he had a right to rely upon the vigilance of the other, the question
whether the intestate was in the exercise of due care is for the jury.

In an action, by the administrator of the estate of a car inspector against a railroad corporation by which he was employed, for causing the death of the plaintiff's intestate, if there is evidence that a conductor in a freight yard of the defendant, who was in charge of the switches in the yard and of a switching engine and train, drove a car against a stationary disabled car, which the intestate was engaged in inspecting, standing in front of it between the rails of the track, when the conductor knew that the disabled car might be undergoing repairs and also knew that the car driven against it had no brakeman upon it to check or control its speed, and thus caused the disabled car to run over the plaintiff, there is evidence for the jury of negligence on the part of the conductor for which the defendant is responsible under R. L. c. 106, § 71, cl. 8, St. 1909, c. 514, § 127, cl. 8.

TORT, by the administrator of the estate of Benjamin F. Anthony, for the conscious suffering and death of the plaintiff's intestate, while in the employ of the defendant as a car inspector, from being run over by two cars of the defendant at its freight yard in Taunton on October 17, 1907, at about three o'clock in the afternoon, the suffering and death being alleged to have been

the result of the negligence of some person in the service of the defendant who was in charge or control of a train and of a signal or switch near the track on which the plaintiff's intestate was run over. Writ dated December 20, 1907.

In the Superior Court the case was tried before Bond, J. The material evidence is described in the opinion. At the close of all the evidence the defendant asked the judge to rule, (1) that the plaintiff's intestate was not in the exercise of due care when injured so that the plaintiff could not recover, and (2) that on all the evidence the jury must find for the defendant. The judge refused to make either of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,500, of which \$500 was for conscious suffering. The defendant alleged exceptions.

The case was argued at the bar in October, 1910, before Knowlton, C. J., Hammond, Loring, Braley, & Sheldon, JJ., and afterwards was submitted on briefs to all the justices.

F. S. Hall, (T. J. Feeney with him,) for the defendant.

J. W. Cummings, (C. R. Cummings with him,) for the plaintiff.

SHELDON, J. If the plaintiff can rely as to the care of his intestate upon nothing but the testimony of his witness Robertson, the only eye-witness of the whole of the accident by which the intestate lost his life, he has failed to show that his intestate was then in the exercise of due care. The conclusion then could be properly stated in the language of the defendant's brief: "It is ordinarily dangerous for a man anywhere to stand between the rails of a track of a steam railroad. This is true whether a man is an employee or is not in the service of the company. Here was a man, over seventy years of age, who had finished inspecting the train which had come into the Taunton freight yard, in broad daylight on a pleasant day, crossing the tracks of a busy yard. Cars were moving down on the different tracks in plain ' sight, and with the usual noise, so that any one in or about the yard must have known that a car was likely to come at any time on any track. The plaintiff's intestate, with his companion Robertson, might have crossed the track on which he was killed in many different places, but he chose to cross in the rear of a stationary car, and to pause in his act of crossing in a place of danger, where he could not see or hear a train that might come on the track where he was standing, and where he could not be seen or heard by any one who might send a car down on that track." The case would be governed by Lizotte v. New York Central & Hudson River Railroad, 196 Mass. 519, and the cases there cited.

The plaintiff contends, however, that upon other evidence and in spite of the testimony of Robertson it could be found that his intestate, who was a car inspector, was engaged at the time of the accident in examining the stationary car, and was rightfully between the rails in the proper performance of his duty, and so might well be found to have been in the exercise of due care. This contention requires a careful scrutiny of the evidence.

The witness Demers testified among other things that there was no brake, "that the brake was no good," upon this car, and after the car had been "kicked" with others upon track number three or four, he gave a notice of this fact to Lyons, the conductor, who was in charge of the switching, by shouting to him, and warned him not to kick this car off; that Lyons was then a little farther away from the witness than the intestate, and he did not know whether the intestate heard it or not; if there was no noise he might have heard it. He testified also that the intestate was much farther from him than Lyons was, in the opposite direction, six times as far away. There was other testimony as to the comparative distance from this witness of Lyons and the intestate, the result of which in connection with the other evidence was to make it a question for the jury whether this outcry of Demers was heard by the intestate. There was testimony from Demers and from Lyons himself that very soon after the warning from Demers this car was taken from the track on which it had been put, and instead of being "kicked" like the other cars was backed slowly and somewhat carefully upon track number five, and there left, near the switch which opened upon that track. Lyons testified that he did not kick it down because he knew from what he had been told that the brake was bad. And it might have been found upon the testimony of Lyons and that of Sunderland, the defendant's yard master, that the manifest purpose of putting the car into this place, near the head of track number five, was that the brake might be examined by an inspector before it should be put into

a train, and that it would be the duty of an inspector who was aware of these facts to make such an examination. All this was done openly and visibly, and the jury could find that it came under the immediate notice of the intestate and was known to him, and that it became his duty to examine the brake. testified that he knew that the car, in the position in which he had left it, was likely to be inspected, and that it would be the duty of the intestate to go up and look at it and inspect it, if he had been notified that it was out of order. One of the answers of this witness was. "If the car went down on five of course if the inspector was notified he would have to go down and look it over," which the jury might regard as giving much significance to the position of the car, if known to the intestate. The statement which the plaintiff testified that Atherly, a witness called by the defendant, made to him tends in the same direction, although this was not independent evidence, having been introduced merely to contradict the testimony of Atherly himself. And although Robertson denied that either he himself or the intestate was making any such examination, yet he also testified in parts of his testimony that the two were walking side by side and talking together and stopped upon the track at the same time without looking especially at the car itself, and in other parts of his testimony that he was a little in advance of the intestate; that the latter stopped and then he (the witness) turned and stopped too, and found the intestate facing the car within two or three feet of it; that if the intestate had heard that there was anything wrong about a car it would be his duty to inspect it; that to inspect a car he stood up and looked at it, and he presumed that the intestate was standing up and looking at it. The jury could have found also that Robertson, although called by the plaintiff, was a hostile witness and disposed to make his statements as unfavorable as possible for the plaintiff. It was undisputed that the course taken across the freight yard by Robertson and the intestate was such as to bring them directly to the rear of this car, and was exactly the course which the intestate would have taken if he had heard the shout of Demers to Lyons, had seen everything that followed, and was on his way to the car with the intention of examining the brake. His stopping behind the car and turning toward it so as to direct his gaze toward the end of the car, the brake or the brake staff and its connections, might indicate that he had begun to make such an examination.

Taking this testimony together, in the opinion of the majority of the court the jury might draw the inference that the plaintiff's intestate, when the car was driven upon him by the impact against it of another car, was engaged in the line of his duty, doing the work which he was employed to do in the manner in which he was expected to do it, and so that he was in the exercise of due care, unless the circumstances were such as to show that he neglected to take some proper precaution or to make some proper provision for his own safety.

It is contended that he ought to have put a blue flag in front of the car, and there was evidence that this was required. there was also evidence that this precaution was required and expected only in cases where an inspector had to go under or upon a car to do some work upon it, and not when he merely stopped to examine it. Moreover, he was and had been continuously in the company of Robertson; and the jury could find that he believed and was justified in believing that everything which he knew to have been said and done about this car was known also to Robertson; and there was evidence that when two inspectors were together in this way and one of them was examining a car, he had a right to rely upon the vigilance of the other. Ahearn v. Boston Elevated Railway, 194 Mass. It could be found also, as we have said, that the very leaving of the car in this position indicated an intention that it should be examined, and it naturally might be expected that the conductor who had so left it for that purpose would not cause other cars to be kicked violently against it, especially when that conductor knew, as the intestate knew or could be found to have known, that it was the brake of the car that was defective.

Accordingly, although it is a close case, we are of opinion that the question of the intestate's due care was for the jury. Mears v. Boston & Maine Railroad, 163 Mass. 150. Brady v. New York, New Haven, & Hartford Railroad, 184 Mass. 225.

There was evidence of negligence in the conductor who was in charge of the switching and of the switching engine and train, for which the defendant is responsible. R. L. c. 106, § 71, cl. 8.

St. 1909, c. 514, § 127, cl. 3. The mere fact of driving one car against another which the conductor knew might be undergoing inspection, could be found to be negligence, especially when the conductor knew that the car so driven had no brakeman upon it to check or control its speed, and, as the jury could find, no one was sufficiently near to it to be able to exercise such control before it would crash against the stationary car.

Exceptions overruled.

James H. Wallace & others vs. New York, New Haven, and Hartford Railroad Company.

Bristol. October 25, 1910. — February 27, 1911.

Present: Knowlton, C. J., Hammond, Loring, Braley, & Sheldon, JJ.

Negligence, In causing fire, Railroad. Railroad, Liability at common law for causing fire negligently. Evidence, Presumptions and burden of proof.

In an action against a railroad corporation, at common law, for using a locomotive engine on its railroad in the State of Rhode Island so negligently that "cinders, sparks and burning matter" were alleged to have been "thrown therefrom," causing the plaintiff's cottage to be destroyed by fire, there was evidence on which it could have been found that the plaintiff's cottage was five hundred and eighty-six feet from the track of the defendant's railroad, that a part of the intervening ground was within the location of the defendant's railroad and a part of it was without, and that, while a train of the defendant lawfully was proceeding on a track of the defendant's railroad, a spark from the locomotive engine fell upon the location of the defendant's road, where there was "quite a lot of heavy grass [and] weeds," and set fire to the grass, that the fire was spread by a high wind and finally reached and destroyed the plaintiff's cottage. There was no evidence that the locomotive engine was emitting a great or unusual quantity of fire or sparks or burning matter and no evidence in regard to its condition and equipment. It did not appear that there was any statute of the State of Rhode Island affecting the defendant's liability and there was no evidence that the common law of that State differed from the common law of this Commonwealth. Held, that there was no evidence of negligence, and that a verdict should be ordered for the defendant.

By the common law of this Commonwealth, apart from the successive statutes which have changed it, the mere fact that a fire, which destroyed property, was started by a spark from a locomotive engine is not prima facis evidence of negligence on the part of a railroad corporation which was operating the engine.

TORT, at common law, for negligently causing the destruction by fire of a cottage and its contents belonging to the plaintiffs at Tiverton in the State of Rhode Island. Writ in the Second District Court of Bristol dated May 12, 1909.

On appeal to the Superior Court the case was tried before Sanderson, J. After a part of the evidence had been heard the plaintiffs waived the original count of their declaration and the case was tried upon a second count, added by amendment, which was as follows: "And the plaintiffs say that at Tiverton in the State of Rhode Island, on or about the fifteenth day of March 1909, they were the owners and possessors of certain personal property, and that the defendant was a railroad corporation owning and operating a railroad and using locomotive engines thereon in said town of Tiverton. And the plaintiffs further say that the defendant carelessly and negligently used its said locomotive engine so that a great quantity of fire, cinders, sparks and burning matter were thrown therefrom, and by reason of such negligence and carelessness on the part of the defendant, the plaintiffs being in the exercise of due care, fire was communicated to said property of the plaintiffs and destroyed the same. To the damage of the plaintiffs, as they say, in the sum of one thousand dollars."

The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the judge ruled that there was no evidence of negligence of the defendant and ordered a verdict for the defendant. The plaintiffs alleged exceptions.

E. F. Hanify, for the plaintiffs.

F. S. Hall, (T. J. Feeney with him,) for the defendant.

HAMMOND, J. At the close of the testimony the judge ruled that "there was no evidence of negligence of the defendant and directed a verdict" accordingly. The only negligence alleged in the declaration is that "the defendant carelessly and negligently used its said locomotive engine so that a great quantity of fire, cinders, sparks and burning matter were thrown therefrom." The ruling must be considered as made with reference to the state of the pleadings; and the only question raised upon the record is whether there was any evidence of the kind of negligence alleged in the declaration.

Inasmuch as the fire occurred in the State of Rhode Island our statute is not applicable; and, it not appearing that there is any statute in that State affecting the question, the rights of the VOL. 208.

parties must be determined by the common law of that State which, in the absence of proof to the contrary, must be assumed . to be the same as in this.

Whatever may have been the law in England either before or after St. 6 Anne, c. 31, or the common law in this State, as to one's liability for damages caused by fire escaping from his houses or lands (as to which see among other cases St. Louis & San Francisco Railway v. Mathews, 165 U.S. 1, and the cases therein cited, and Lothrop v. Thayer, 138 Mass. 466, and the authorities therein cited), it is now well settled in England and generally throughout the United States that the gist of the action is negligence. Vaughan v. Taff Vale Railway, 5 H. & N. 679. Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469. Eddy v. Lafayette, 163 U.S. 456. (For a collection of the cases see 13 Am. & Eng. Encyc. of Law, (2d ed.) p. 411, note 2, and p. 415, note 4.) And such is the law in this Commonwealth. Barnard v. Poor, 21 Pick. 378. Tourtellot v. Rosebrook, 11 Met. 460. Higgins v. Dewey, 107 Mass. 494. And this same principle is applied in the case of fire resulting from sparks falling from a locomotive engine lawfully in operation upon the track of a railroad corporation. See in addition to the cases hereinbefore cited those collected in Thompson, Negl. §§ 22, 30, note 7, and those named in 13 Am. & Eng. Encyc. of Law, (2d ed.) p. 411, note 2, and p. 415, note 4. In any such case against a railroad corporation the defendant is not answerable unless shown to be negligent, the burden being upon the plaintiff to show it. This negligence may consist (1) in not providing and keeping in suitable repair the best well known practical contrivances to prevent the unnecessary escape of sparks from the locomotive, or (2) in not keeping its grounds free from combustible materials so situated as to be likely to catch fire from sparks from the locomotive, or (3) in not taking proper precaution to stop or control a fire started with or without negligence upon its own premises, so that it will not destroy freight upon its own land or property on land of another. For negligence in either one of these respects the defendant is answerable. Whether in this case there was any evidence of the second or third kind it is unnecessary to consider, since, as above stated, only that of the first kind is alleged in the declaration.

The evidence would warrant a finding that the plaintiffs' cottage was situated about five hundred and eighty-six feet westerly of the defendant's railroad track; that part of the intervening ground was within the location of the railroad and part without, the two parts being separated by a stone wall; that on Monday, March 15, 1909, at about half past one in the afternoon, while one of the defendant's trains was lawfully proceeding on the defendant's tracks in Tiverton in the State of Rhode Island, a spark from the locomotive fell upon the location of the road where there was "quite a lot of heavy grass [and] weeds," and set fire to the grass; and that the fire, spreading under the influence of a high wind, finally reached and destroyed the cottage with its contents.

There was no evidence, however, that the locomotive was emitting a great or unusual quantity of fire or sparks or "burning matter," or of the condition and equipment of the locomotive. But it is contended by the plaintiffs that the mere fact that the fire was started by a spark from the locomotive is prima facie evidence of negligence, and that such prima facie case stands, unless controlled by other evidence as to the actual condition of the locomotive and its equipment. There is a plain and direct conflict among the authorities on this point, many of them in favor of the rule urged by the plaintiffs, and many to the con-The cases are numerous, and it is impracticable and useless to attempt to discuss them in detail. As representative cases see, in favor of the rule, Louisville & Nashville Railroad v. Reese, 85 Ala. 497, and Spaulding v. Chicago & Northwestern Railway, 30 Wis. 110; and, contra, Lowney v. New Brunswick Railway, 78 Maine, 479, and Chicago & Eastern Illinois Railroad v. Ostrander, 116 Ind. 259. In the Alabama case above cited in favor of the rule, it is said to be not a rule of liability but of evidence; and in the Wisconsin case, also in favor of the rule, Dixon, C. J., says: "The presumption, therefore, of negligence or of the want of proper equipments, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but, of the two, rather weak and unsatisfactory." The rule cannot rest upon the doctrine of res ipsa loquitur, for there is no such probable connection between the falling of a spark from a locomotive and negligence as is required for the application of that doctrine. It is conceded to be an exception to the general rule as to the proof of negligence, and when adopted it seems to be put on the ground of the difficulty the plaintiffs otherwise would experience in proving negligence in the condition of the locomotive. As stated by Dixon, C. J., in the Wisconsin case above cited: "It is indulged in merely for the purpose of putting the company to proof and compelling it to explain and show, with a reasonable and fair degree of certainty... that it had performed its duty in this particular," that is, in the construction and equipment of its locomotive.

There is no reported decision in this court which absolutely determines the matter, or in which it is discussed, and since the Sts. of 1837, c. 226, and 1840, c. 85, which so far as we are aware were the first statutes passed anywhere upon the subject, the question has become of no consequence as to all fires caused in this State by locomotives. Upon a consideration of the reasons upon which this exception is based, we do not feel that they are sufficient to lead this court to depart from the general rule of evidence as to proof of negligence. If there is to be such an exception to the general rule, it should be established rather by legislative action (as has been done in this State) than by judicial construction.

Exceptions overruled.

HARRIOTT M. KENDALL vs. JOHN D. HARDY, trustee.

Suffolk. November 28, 29, 1910. — February 27, 1911.

Present: Knowlton, C. J., Morton, Hammond, Bralley, Sheldon, & Rugg, JJ.

Way, Private. Easement. Equity Jurisdiction, Mandatory injunction, Damages. Words, "Drainage."

In a suit in equity by the owner of an equity of redemption of an apartment hotel adjoining on its rear an alleyway sixteen feet wide, against the owner of another apartment hotel also adjoining on its rear the same alleyway, to compel the removal by the defendant of certain bay windows projecting over the passageway, it appeared that the plaintiff had acquired by his deed an easement in the passageway sixteen feet wide back of the two buildings and that it was "always to be kept open to its full width for the benefit of the abutters thereon for the purposes of light, way, drainage and the like," that the defendant had constructed

four horizontal rows of bay windows, the lowest of which started at a height of from eighteen to twenty-one feet above the surface of the passageway, that when the windows were constructed the plaintiff was not the owner of his property and that he did not acquire his title to it until a considerable time after the construction of the windows, that the nearest bay window on the defendant's building was about one hundred and twenty feet from the plaintiff's building, that the defendant's bay windows did not affect the light of the plaintiff's building, and did not noticeably diminish the light which came to persons travelling on the passageway. All the abutters on the passageway other than the plaintiff had agreed to the maintenance of the defendant's bay windows. When the defendant's bay windows were constructed the plaintiff had a moral right to redeem the property, which afterwards became his, by reason of an oral agreement that could not be enforced, and a mortgagee in possession, who then was the owner of the property, assured the defendant that he should not object to the windows personally and told him that the plaintiff was not likely ever to acquire any legal right to the property. Held, that equity did not require the enforcement of the plaintiff's technical right by a mandatory injunction, and that he was entitled only to his legal right to nominal damages.

In a suit in equity by the owner of an apartment hotel adjoining on its rear an alleyway sixteen feet wide, against the owner of another apartment hotel also adjoining on its rear the same alleyway, the plaintiff sought to restrain the defendant from maintaining coal bins under the passageway. It appeared that the plaintiff had acquired by his deed an easement in the passageway and that it was "always to be kept open to its full width for the benefit of the abutters thereon for the purposes of light, way, drainage and the like." It appeared also that before the first of the deeds creating the easement in the passageway was made the city had laid out and constructed a public sewer through the whole length of the passageway and that all the buildings on the passageway drained into this sewer. Held, that, if the word "drainage" in the description of the easement in the deed included anything more than surface drainage, it referred merely to drainage into and through the public sewer, that the easement included no right to have the land beneath the surface of the passageway remain unused, and that the plaintiff could not prevent the defendant from constructing and maintaining on his own land under the passageway a coal bin which did no damage to the plaintiff.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 13, 1909, praying that the defendant be ordered to remove from a building called the Hotel Puritan, owned by him as trustee, certain bay windows projecting over a passageway at the rear of that building and also to remove a certain cellar, storage room and subway underneath the same passageway.

A commissioner to take the evidence was appointed under Chancery Rule 35 and the case was heard by *Braley*, J., who made a memorandum of decision and order for a decree as follows:

"Upon the evidence I find that both parties derive title by mesne conveyances from Henry M. Whitney, Grenville T. W.

Braman, and Henry D. Hyde, trustees. After the common grantors acquired title on October 15, 1880, they caused a plan of the locus to be prepared by Fuller and Whitney, dated December 28, 1885, which was recorded in the Suffolk Registry of Deeds, although the date of record did not appear. shows a passageway sixteen feet in width, beginning at a point one hundred and twenty-five feet easterly from the east line of Ipswich Street; thence at a right angle leading northerly from Newbury Street a certain distance shown by the plan, then turning at a right angle and running easterly to a 'dead end.' The tract was divided by the way, so that the portion north of the way fronted on Commonwealth Avenue, and the portion on the south of the way fronted on Newbury Street. In the deed from Whitney et als. to Susan W. Farwell, January 30, 1886, the southerly boundary is 'on a passageway 16 feet wide, which leads to Newbury Street, as shown on the plan hereinafter mentioned and which is always to be kept open its full width for the benefit of the abutters thereon for the purposes of light, way, drainage and the like . . . and being a part of the land shown on a plan made by Fuller and Whitney, Civil Engineers, dated December 28, 1885.

"In the subsequent deeds of Farwell to Potter, Potter to Brooks, Brooks to Horn, Horn to Wheatland, and Wheatland to the plaintiff, Kendall, the passageway as shown on a plan of Fuller and Whitney, dated December 28, 1885, and recorded . . . in Suffolk Registry of Deeds, B. 1707, P. 401 is described as the southerly boundary. I am not satisfied that at the date of the deed to Farwell the original grantors had parted with all title to the land now owned by the defendant, but if they had I find that the deeds to Elizabeth Lee, dated January 20, 1886, and to Joseph S. Bigelow, dated January 30, 1886, the defendant's predecessors in title, contained a similar reference to the plan, and a like description of the way, as in the deed to Farwell.

"Upon these findings I rule that this passageway, for its full width and length, and to be kept open to the sky, became by grant an easement appurtenant to the plaintiff's estate.

"The defendant has erected a building known as the Hotel Puritan, the rear of which abuts on the northerly line of the passageway. It is seven stories in height above the basement. In its construction bay windows have been built out from the six upper stories, which project beyond the north line of the way about three feet. The first tier of windows is from eighteen to twenty-one feet above the level of the way. The plaintiff's building, an apartment hotel, which is known as the Colonial, is situated to the east of the Hotel Puritan, and abuts in the rear on the northerly line of the passageway by which, as previously stated, it is bounded on the south. Under the ruling already made so much of the bay windows of the defendant's building as project over the way constitute an obstruction of the way and an unlawful interference with the plaintiff's rights therein.

"The defendant contended that if this conclusion was reached a mandatory injunction ought not to be awarded, but that the plaintiff should be remitted to the assessment of damages. It was sufficiently proved, and I find, that, in fact, the plaintiff's estate has not been damaged by the putting out of the bay windows. Neither light nor the use of the way as a means of ingress or egress has been cut off or appreciably diminished. But if all the remaining abutters whose estates have been improved should put out similar projections, then I find that the plaintiff's estate might be damaged as to access of light; and the way might be so darkened as to impair its convenient use.

"The plaintiff is not obliged to sell her land for the defendant's benefit at a valuation, even if the amount to be paid by way of damages must, upon the evidence before me, be considered as merely nominal. Her remedy in equity is ample to establish and preserve the right itself. Downey v. Hood, 203 Mass. 4, 11, and cases cited. Nor are the equities between the parties such as to take away her right to equitable relief. The defendant, before he began to build, knew of the easement. He not only employed competent counsel to examine the title to the land, but advised with him as to the scope of the plaintiff's dominant rights. He went farther, and procured from all the other abutters an agreement in writing, permitting the bay windows. This agreement the plaintiff declined to sign, and insisted upon the passageway being kept free from the proposed encroachment. Nor thereafter has she been guilty of such delay in bringing suit as to bar the maintenance of the bill.

"It further appeared that the defendant, having been advised

that he lawfully could do so, excavated under the way, but not beyond the centre of the roadway, and put in coal or other storage bins for use in connection with the hotel. The construction of these bins or underground cellars does not appear in any manner to have interfered with the plaintiff's use of the way for either the purposes of travel, communication, or drainage. I am unable to find that this use of the soil under the way, the fee to which is in the defendant to the centre line, is inconsistent with the full use and enjoyment of the easement by the plaintiff, or exceeds his rights as an owner. But while the plaintiff cannot maintain the bill on this ground, I find and rule that she is entitled to a mandatory injunction, commanding the defendant, within a time to be specified in the decree, to remove so much of each bay window as projects beyond the north line of the passageway. Attorney General v. Williams, 140 Mass. 329, 334. Downey v. Hood, 203 Mass. 4, 11."

The justice made a final decree ordering the defendant to remove, before September 1, 1910, from the building known as the Hotel Puritan described in the bill so much of each bay window projecting from the rear of that building as projects over and beyond the northerly line of a passageway sixteen feet wide, lying in the rear of that building, and on which the building abuts on its southerly side; and that the defendant pay the costs of the plaintiff, to be taxed by the clerk. It was further decreed that the construction and maintenance of the coal bins, storage rooms or other subterranean cellars existing and referred to in the bill as under the passageway, and used in connection with the defendant's building, did not interfere with the rights of the plaintiff in the passageway, and that she was entitled to no relief in regard to them.

The defendant appealed. The plaintiff appealed from the last part of the decree relating to the construction and maintenance of coal bins, storage rooms or other subterranean cellars

The case was argued at the bar in November, 1910, before Knowlton, C. J., Morton, Hammond, & Sheldon, JJ., and afterwards was submitted on briefs to all the justices except Loring, J.

M. Storey, (H. S. Davis with him,) for the defendant.

A. Whiteside, (W. I. Nottage with him,) for the plaintiff.

KNOWLTON, C. J. The plaintiff is the owner of the equity of redemption in an apartment hotel on the southerly side of Commonwealth Avenue called The Colonial, and the defendant is the owner of the Hotel Puritan on the same avenue, a short distance west of the plaintiff's property. Both of these houses extend back from Commonwealth Avenue southward to a passageway sixteen feet wide, between Commonwealth Avenue and Newbury Street, which starts from a dead end at its eastern extremity and runs westward, parallel with these two streets, and then turns at a right angle to the south and enters Newbury Street. The land through which the passageway runs belonged to Henry M. Whitney and others, trustees. Their deed to Farwell, under which the plaintiff obtained her title, bounded the premises southerly "on a passageway sixteen feet wide which leads to Newbury Street as shown on the plan hereinafter mentioned and which is always to be kept open its full width for the benefit of the abutters thereon, for the purposes of light, way, drainage and the like," etc. The deeds from those grantors, under which the defendant claims title, bound the lots on the passageway, and refer to it in substantially the same way. The deeds to all the other abutters on that part of the passageway which runs parallel with Commonwealth Avenue and Newbury Street refer to the passageway in similar, although not identical terms.

There is no doubt that the single justice rightly ruled that the plaintiff, by her deed, acquired an easement in that part of the passageway which is in the rear of the defendant's building, and the right to have it kept open.

The defendant, in the erection of the Hotel Puritan in 1908 and 1909, constructed four horizontal rows of bay windows, the lowest of which start at a height of from eighteen to twenty-one feet above the surface of the passageway, and all of which project about three feet beyond the line of the passageway. The maintenance of the windows there is a technical invasion of the plaintiff's right, and this bill is brought to obtain a mandatory injunction which will compel the defendant to remove them. The defendant has constructed bins or vaults under the passageway, extending seven feet and four and one half inches beyond the line of it, which he uses for the storage of coal and other

articles. Against the maintenance of these the plaintiff in like manner asks for an injunction.

The first and most important question is whether, under the circumstances, the plaintiff is entitled to the remedy that she seeks. She was not the owner of the property when these windows were constructed. George Wheatland was then the owner of it, subject to two mortgages to secure amounts which nearly equalled its value. He was also the owner of the larger one of these mortgages. She did not obtain her title until a considerable time after the windows had been constructed. While it is agreed that previously she had a moral right and interest in the property, we understand that she had no right that was enforceable or recognizable in law. The defendant procured from some of the abutters on the passageway an agreement in writing that he might erect and maintain the windows on the building, and all the abutters except the plaintiff have joined in the agreement, without the payment of any consideration. He went to Mr. Wheatland, who was the only person except the other mortgagee that had legal or enforceable rights in the property, and Mr. Wheatland's testimony in regard to the conversation is as follows: "I told him I was not interested in it and said I would not bring any suit. I did not want to do that sort of thing. I should not bring suit against a man when there was no reason. I did not think it proper for me." The defendant testified that he told Mr. Wheatland "what Mr. Kendall proposed to do, and . . . Mr. Wheatland said that he did not think Mr. Kendall had any standing in the matter at all, that he had - only he had a verbal agreement to redeem this, and there was due him then about \$185,000, and he did not believe Kendall or anybody else would redeem the property at that figure, and asked me if I did. . . . He did not wish to take any action which would seem hostile to Kendall, but that as far as -Kendall could not do anything until he had title to the property, ... and in the meantime I need not worry, ... and that, so far as he was concerned, he would have no part whatever in any such action as Mr. Kendall was making." This conversation was after the work had been begun and before it was finished. Kendall was the plaintiff's husband and agent.

The nearest bay window on the defendant's building is about

one hundred and twenty feet from The Colonial, while on the building directly west of The Colonial, between that and the Hotel Puritan, there are bay windows projecting out over the passageway which have been there for ten or twelve years, and, so far as appears, without objection from anybody. The nearer of these bay windows is within about fifteen feet of The Colonial, and the farther within about thirty feet, and they are so located that from no part of the plaintiff's house can the bay windows of the defendant's house be seen, even by leaning out of a window.

The light, which is one of the purposes for which the passageway was to be kept open, was for the benefit of the houses along the way. It is manifest that the defendant's bay windows do not affect the light of the plaintiff's house. So far as the light was for the benefit of persons travelling on the passageway, the bay windows do not noticeably diminish it. The justice found that the plaintiff's estate has not been damaged by the putting out of the bay windows. All of the other abutters on the way have agreed to the maintenance of them. The plaintiff complains of nothing but a technical invasion of her legal rights, which causes her no damage. This too, when at the time of the construction of the windows she had no right to the property that could be enforced, and when the owner at that time, without attempting to deprive her of her moral right, indicated his personal willingness, as owner, that the windows should be maintained there. The question is whether, under these circumstances, equity requires that the defendant should remove the windows at a large expense and to the great damage of his property. When the legal owner of the property gave him an assurance that he should not object to the windows personally, and told him that the plaintiff was not likely ever to acquire any legal right to the property, is the fact that, before the windows were completed, he understood that the plaintiff had a moral right to redeem, with no right of which the law takes cognizance, and with no power to give him any rights, sufficient to charge him with the commission of a great wrong, such as to subject him to the penalty of cutting off his windows at great loss, when no one could be benefited by the removal of them?

Under the facts of this case we are of opinion that equity does

not require the enforcement of the plaintiff's technical right by an order for an injunction. Her legal right remains, and she is entitled to nominal damages. A majority of the court are inclined to apply the general principle under which the plaintiff has been left to his remedy in damages in many cases. See Brande v. Grace, 154 Mass. 210; Lynch v. Union Institution for Savings, 159 Mass. 306; Harrington v. McCarthy, 169 Mass. 492; Levi v. Worcester Consolidated Street Railway, 193 Mass. 116; Washburn v. Miller, 117 Mass. 376; Isenberg v. East India House Estate Co. 3 De G., J. & S. 263; Durell v. Pritchard, L. R. 1 Ch. 244; Hall v. Rood, 40 Mich. 46; Nicodemus v. Nicodemus, 41 Md. 529. The case of Stewart v. Finkelstone, 206 Mass. 28, 38, was very different from the present one in its facts.

The single justice held that the construction by the defendant of the underground bins or vaults, for use for the storage of coal and other articles, was not inconsistent with the full use and enjoyment of her easement by the plaintiff, and did not exceed the defendant's rights as owner.

The easement granted was the right to have the passageway kept open. This includes the entire space above the ground. The additional words, "for the purposes of light, way, drainage, and the like," are explanatory of the intended use of the passageway, but they create no additional right unless by implication. Drainage is the only one of these words that by any interpretation can relate to rights underground. Its meaning can be satisfied by referring it to drainage upon the surface. When we consider it in reference to the plaintiff's construction of drains beneath the surface, it is important to remember that, before the first of these deeds referring to the passageway was made, the city had laid out and constructed a public sewer through the whole length of the passageway. It is to be assumed that this had been done under proper proceedings which gave the city and the public permanent rights there. It is found that all the buildings on the passageway drain into this sewer. If underground drainage was included in the reference in the deeds, it is not to be supposed that the parties contemplated anything more than drainage into and through the public sewer. We are of opinion that these deeds did not give the individual abutters a right to have the land beneath the surface of the

passageway remain unused, so that the construction of a coal bin by an owner under it would subject him to a suit by an abutter whose property was not damaged by it. The rule as to ownership along highways where a public easement is taken, which gives rights for all kinds of passage and transportation beneath the surface as well as above it, permits the individual proprietor to use the property in any reasonable way, so long as he does not interfere with the exercise by the public of its para-Sears v. Crocker, 184 Mass. 586. Whenever the mount right. public authorities find it necessary to use it, the individual owner must give way. Without determining whether the reference to drainage in these deeds gives the grantees any rights in the passageway beyond the use of it for surface drainage, and as abutters entitled to the benefit of the public sewer, we are of opinion that the findings and rulings of the judge on this point were correct.

It follows that the bill must be dismissed as to that part of it which relates to the subterranean construction, but will be retained for the establishment of the plaintiff's right as to the bay windows, and a decree awarding nominal damages and costs, unless the plaintiff elects to have it dismissed altogether.

So ordered.

JAMES BAIRD vs. BAPTIST SOCIETY,

Essex. November 2, 1910. — February 28, 1911.

Present: Knowlton, C. J., Hammond, Loring, Sheldon, & Rugg, JJ.

Nuisance, By reason of snow or ice. Ice and Snow.

St. 1908, c. 305, declaring that the provisions of R. L. c. 51, §§ 20-22, "so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice," applies to an action for personal injuries caused by snow and ice which fell upon the plaintiff from the roof of the defendant's building where the defendant negligently had permitted it to accumulate, and there is no liability unless the required notice was given within ten days after the injury.



TORT for expenses incurred by reason of personal injuries alleged to have been sustained by the plaintiff's infant daughter as below set forth. Writ dated June 19, 1909.

The declaration was as follows: "The plaintiff says that the defendant is a religious society situated in Newburyport in said County of Essex; that on or about January 21, 1909, the plaintiff's infant daughter Lucinda M. Baird, while walking by a church edifice, the property of the defendant, situated in Newburyport aforesaid, and while in the exercise of due care, was struck and thrown to the ground and rendered unconscious by snow and ice which fell from the roof of said edifice and which said defendant had negligently permitted to accumulate on said roof; that said defendant neglected to provide proper safeguards to prevent said snow and ice from falling upon said plaintiff's infant daughter as aforesaid; that the plaintiff has expended and will be compelled to expend large sums of money for medical attendance and nursing of his said infant daughter; that said plaintiff has lost the services of his said infant daughter by reason of defendant's negligence; that said plaintiff's infant daughter was in the exercise of due care and the defendant was negligent, all to the plaintiff's damage."

The defendant demurred to the declaration as follows: "Now comes the defendant in the above entitled action and demurs to the plaintiff's declaration for that it is not alleged nor does it appear that notice of the time, place and cause of the injury or damage alleged was given, as required by R. L. c. 51, §§ 20–22, and by St. 1908, c. 305."

In the Superior Court Raymond, J., sustained the demurrer and ordered judgment for the defendant. From the judgment entered in pursuance of this order the plaintiff appealed.

St. 1908, c. 305, is as follows: "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice. Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a

conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions."

The case was submitted on briefs.

T. S. Herlihy, for the plaintiff.

J. H. Casey, N. N. Jones & E. Foss, for the defendant.

HAMMOND, J. The question is whether St. 1908, c. 305, applies to the case stated in the plaintiff's declaration.

At the time of the passage of this statute there were two kinds of liability for damages suffered by a traveller through a defect in a public way, the one created by statute, the other existing at common law. The first was imposed upon only such parties as were charged by law with the duty of keeping the ways in proper condition, and was based upon a neglect to perform that duty. The second rested upon parties by whose acts, positive or negligent, a defect was created in the way. One of the conditions of the statutory liability was that within a certain prescribed time after the injury there should be given to the person sought to be charged a notice of the time, place and cause of action. Pub. Sts. c. 52, § 19. This notice is not a mere step in enforcing a cause of action, but is a condition precedent to its existence, or in other words is one of its essential elements. Gay v. Cambridge, 128 Mass. 887. No such notice was required, however, in the case of the common law liability.

It may be contended that, so far as respects the defective condition of the premises, the statute under consideration applies only to such defects on private premises as render insecure the footing of the traveller thereon. But we think that is too narrow a construction. It is to be observed that this statute is not an amendment to R. L. c. 51, § 20. It has no relation whatever to the statutory liability imposed by that chapter. So far as respects public streets it refers only to the common law liability for the creation of a nuisance therein, and gives to those liable at common law for defect in a public way the same right to notice as that to which theretofore those upon whom rested the statutory liability were entitled.

But the statute does not stop with public streets, nor does it by express language name streets at all except "an adjoining way." It goes farther and declares that the notice shall be given in cases where there is a defective condition of the premises. Now, the common law liability for a defect in the premises is not confined to cases where the defect is in a private way, but may extend to any defect whereby employee, visitor, or stranger may be injured. In our climate defects so far as caused by ice or snow may be very transient; and the manifest purpose of this and similar statutes is to give to the person charged with neglect prompt notice, so that he may have a reasonable chance to examine into the cause of complaint and collect evidence of the facts. Whether the defect be in a private way or on some other part of the premises, the reason for the notice is equally applicable. In view of the comprehensiveness of the language of the statute and the manifest purpose of its enactment, it must be held that its scope is not limited to defects in ways, public or private, for which a person or corporation may be answerable at common law, but extends to any defect upon the premises whether or not it be in a way.

R. L. c. 51, § 20, provides that the notice shall be given within ten days after the injury, if the defect consists "in part of snow or ice, or both." It is plain from the allegations of the declaration that the defective condition of the defendant's building to which the injury to the plaintiff's daughter was attributable consisted in part of the snow and ice then being upon the roof, and in part of the lack of proper safeguards to prevent the snow and ice from falling. The defect consisted in part of snow and ice, and the statute is applicable. There is in the declaration no averment that notice was given. The demurrer was therefore rightly sustained.

Judgment for the defendant.

GEORGE A. PENDERGAST vs. BURLEY AND STEVENS, Incorporated.

Essex. November 8, 1910. — February 28, 1911.

Present: Knowlton, C. J., Hammond, Loring, Sheldon, & Rugg, JJ.

Negligence, Employer's liability.

A workman in a shoe factory, operating a dieing out or "dinking" machine used for cutting leather into required shapes, which may run as fast as one hundred and fifteen times up and down in a minute, who, for the purpose of removing a die four or five inches high, which has stuck in the block, unnecessarily puts his hand on the top of the die, when he might remove the die perfectly well by taking hold of it lower down, and loses the end of his finger by the beam unexpectedly coming down on the die when his hand is on top of it, is not in the exercise of due care, and cannot recover from his employer for his injuries.

TORT by a workman employed in the defendant's shoe factory at Newburyport, for personal injuries, consisting of the loss of a part of one of the plaintiff's fingers, which was caught between the beam of a dieing out or "dinking" machine and the top of a metal die used for cutting leather into required shapes. Writ dated January 5, 1909.

In the Superior Court the case was tried before Fox, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

D. P. Page & S. W. Emery, for the plaintiff, submitted a brief. R. Spring, for the defendant.

HAMMOND, J. While the plaintiff was at work for the defendant on a "dinking" machine, one of his fingers was caught between the striking beam and the top of the die, and was injured. The machine was operated by a treadle. Every time the treadle was pressed by the operator's foot the machine started and the beam came down upon the die, and when the foot was taken from the treadle the machine instantly stopped.

There was some evidence that the machine was out of repair and therefore repeated, and that in that way the plaintiff's injury was caused. We have not found it necessary to consider the question of the defendant's negligence because we are of opinion that even if there was negligence of the defendant there is nevertheless a fatal defect in the plaintiff's case.

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At the time the plaintiff received his injury his finger was on top of the die. In direct examination he testified as follows: "The accident happened to me that morning. The die had stuck on the block. In the first place I touched my foot to the treadle and cut the last lift that would fill the die, and I had to remove the die from the block and it was stuck in the block and at the time I was breaking it away or removing it, the machine repeated, jamming my finger. When the die got full I took my foot off the treadle to stop the machine. The machine repeated. When I took my foot off the treadle I expected the machine to stay in place as it always did before that morning. The only occasion I had to put my hand on the top of the die was to remove it from the block if it stuck, and it stuck. At the time the machine repeated my foot was not on the treadle. was stuck because when the beam comes down on the top of the die it sinks the edge here into the block. It took quite a little exertion to pull the die out of the block. When the machine repeated I jammed my right forefinger, the beam jammed it against the die. I could not exactly say the position of my hand at the time it happened. I was not able to save myself from being hurt." And on cross-examination: "I haven't an idea how my fingers got caught. I know the beam stops at the top of the die, and the only thing that stuck up was the top of the die, and it is plain that I must have put my hand on the top of the die. I would not swear I put my hand on the top of the die, but that is the only place I could have put it and had it struck. My left hand was like that (indicating). Before the beam came down and struck the top of the die I did not try to loosen it with my left hand. Before I put my right hand on top I made no effort to loosen it with my left hand. At that moment I was thinking about the whole machine. I was not thinking about the pulley a great deal; my attention was directed entirely to one part, and that part was the die and the leather that was on the bed." From all the evidence it is plain that the plaintiff intentionally placed his hand upon the top of the die and that the injury was due in part at least to that position of his hand.

Upon the question whether such a position was necessary, usual or proper, the evidence was substantially as follows:

Leary, called by the plaintiff, testified on cross-examination that "the . . . die is four or five inches high. It is a common form of die. The way it is used is to place it on the leather and hold it with two hands or one hand, and you keep your hand there while the header comes down. The header comes down and strikes on the top of that die and the hand of the operator is on the die between the two [the header and the leather], so that the header does not come in contact with his hands at all. he holds his hands in that position it would not, unless he puts his hand on top of the die. He does not put his hand under the cutting edge of the die; there is no occasion to do it." The plaintiff testified that "the only thing that would cause me to put my fingers on top of the die was when it would stick on the block. When it sticks would have to work it back and forth either this way (indicating) or put my finger over it. . . . The dies sometimes stick pretty firmly. . . . Just before this accident happened I was looking at the die. Before I put my right hand in I did not look up to the beam to see if it had stuck. If I had waited about a second I could have seen whether it stopped. If I had put both hands on the die like that, that is, both hands below the top of the die, I could have got a pretty good shove on it, my whole weight, and if I had put my hands in that position, the machine could not have touched me." Miller, called by the plaintiff, testified: "If you take hold of a die and keep your fingers off the top of it, you cannot be injured by the beam coming down. The die can be readily grasped without putting your fingers on top. The ordinary way is to hold the back side to you, and they are ordinarily handled by gripping it a little lower than the middle. There is no occasion to put the fingers under the cutting edge." It is plain upon this evidence that in placing his fingers on top of the die the plaintiff was doing what was neither necessary nor usual, nor called for by any unusual exigency. The machine acted rapidly and easily, one witness testifying that " such a machine may run as fast as one hundred and fifteen times up and down in a minute," and that "if the machine revolves a hundred revolutions a minute, you just tap the treadle; you don't have to keep your foot on long to make it come down twice. . . . To make the machine go up and down twice you would have to keep your foot on the treadle a moment,

a little more than a second, less than two." To place a hand unnecessarily on top of the die while at work upon a machine of this method and rapidity of action was manifestly a careless act.

Exceptions overruled.

WILLIAM G. CLARK, trustee, vs. ARTHUR D. STORY & others.

Essex. November 8, 1910. — February 28, 1911.

Present: Knowlton, C. J., Hammond, Loring, Sheldon, & Rugg, JJ.

Equity Jurisdiction, For an accounting, To redeem mortgaged property.

In a suit in equity by the owner of a vessel or by his trustee in bankruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the mortgage, which is found to have been fraudulent and void, and have repaired and made use of the vessel at a good profit, the defendants must be charged with the net amounts which they have received as the earnings of the vessel or which by the exercise of due diligence they ought to have received.

In a suit in equity by the owner of a vessel or by his trustee in bankruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the mortgage, which is found to have been fraudulent and void, and repaired and made use of the vessel at a good profit, and who consequently are charged with the net amounts which they have received as the earnings of the vessel, if it is shown that one of the defendants rendered services in connection with the use of the vessel, which resulted in very successful voyages and very large earnings, and that a fair compensation for such services would be \$500, such defendant is entitled to be credited with that amount, and is not to be deprived of it on the ground that he should not be allowed to profit by his wrongdoing, because the avoidance of the foreclosure does away with the effect of the fraud and the defendants are to be treated as mortgagees in possession, whose duty it was to put the vessel to a valuable use, and there is no reason why the plaintiff should take without compensation the benefit of the valuable services of the defendant which produced an advantageous result for the plaintiff's benefit.

In a suit in equity by the owner of a vessel or by his trustee in bankruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the mortgage, which is found to have been fraudulent and void, and repaired and made use of the vessel at a good profit, and who consequently are charged with the net amounts which they have received as the earnings of the vessel, the defendants are not to be allowed for premiums paid for insurance, a part of which was upon another vessel, as the premiums for insurance, even on the vessel in question, constituted no part of the mortgage debt and were not paid under any provision of the mortgage, but were wholly independent matters.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 15, 1908, and amended on October 18, 1909, by the trustee in bankruptcy of John Gleason, Jr., to redeem two schooners, named respectively the Mary A. Gleason and the Agnes V. Gleason, from mortgages made by the bankrupt, and for an accounting.

The case was referred to Alfred W. Putnam, Esquire, as master. After the filing of his reports, the second being upon a recommital, the case was heard by Rugg, J. He found that there had been a valid foreclosure of the mortgage upon the Mary A. Gleason and that the plaintiff had no right to redeem that vessel from the mortgage upon it. In regard to the Agnes V. Gleason, he found as follows:

"I have read over all the evidence reported by the master, and find that his material findings of fact are supported by it, and none of them are plainly wrong. It follows that the attempted foreclosure of the Agnes V. Gleason was invalid and fraudulent against the plaintiff, and he is entitled to redeem her. The defendants under the assumed foreclosure took possession of her, repaired her and navigated her at good profit until March. 1908, when she was lost at sea. . . . Under the frame and prayers of the bill and the report of the master, and in view of the way in which the case was tried before the master, I rule that the plaintiff is entitled to an accounting for the value of the schooner at the time of her loss and the profits made by her between then and the time of the fraudulent foreclosure. . . . The defendants having been fraudulently in possession of the schooner are not entitled to any [compensation for] services in her care and management. They cannot in equity make profit out of their wrong. The rule as to mortgagees in possession of real estate has no application. This bill is to redeem and for an accounting. It is not in the nature of an action of assumpsit. nor in any way in confirmation of the act of the defendant in attempting to foreclose. None of the defendants are entitled to credit for any expenditures for the benefit of the Mary A. Gleason or the Agnes V. Gleason or of their owner before the foreclosure. Respecting these they stand as general creditors and cannot be permitted in equity to obtain an advantage by their wrongful attempt at foreclosure. The defendants are not entitled to recover anything for the "outfit" for which the crew were ultimately responsible, and as to which they protected themselves by insurance. But they are entitled to interest on the mortgage to the defendant from the date of foreclosure, up to which time interest appears to have been either paid or computed in the figure \$2,300.

"The defense of laches on the part of the trustee in bankruptcy after his appointment was expressly waived. I do not find any laches on the part of the bankrupt himself which affects the plaintiff. The plaintiff is entitled to recover the value of the schooner at the time of her loss and the profit she earned after the attempted foreclosure less the amount of the mortgage with interest at the time and valid liens, which appear to be \$1,142.76, with interest from the date of filing the bill to date of final decree. The master is correct in his rulings of law as to liens. The parties agree that this figure of \$1,142.76 is right provided no error in law has been made.

"It follows that all exceptions of the plaintiff and all exceptions of the defendants are to be overruled as either unsound in law or immaterial, and the master's reports are to be confirmed. The balance due from the defendants to the plaintiff is \$1,142.76. A decree should be entered for plaintiff for this sum with interest and costs."

From a decree entered in accordance with this memorandum of decision the defendants appealed.

The defendants' thirteenth exception to the master's report, mentioned in the opinion, was to the refusal of the master "to find in the statement of account, that the defendant Benjamin A. Smith is entitled to the sum of \$500 for his compensation for services rendered in connection with the schooner Agnes V. Gleason." Benjamin A. Smith was one of the three defendants, who were the assignees of the mortgage on the Agnes V. Gleason and who attempted the foreclosure which was found to have been fraudulent. In regard to the value of the services rendered by Benjamin A. Smith the master made the following finding: "At the request of the defendants I find, if it be at all material, that \$500 would be a fair compensation for a man of B. A. Smith's experience for services similar to those he rendered in connection with this schooner between April, 1907,

and March, 1908." He refused to find that Smith should be allowed this sum.

J. M. Marshall, for the defendants.

W. A. Pew, Jr., for the plaintiff.

SHELDON, J. The questions now raised relate only to the schooner Agnes V. Gleason and to the mortgage upon her.

- 1. The attempted foreclosure having been avoided as fraudulent, the defendants must be treated as assignees of the mortgage. Having been in possession and control of the vessel, they must be charged with the net amounts which they have received as her earnings, or which by the exercise of due diligence they ought to have received. White v. Brown, 2 Cush. 412. Mills v. Day, 206 Mass. 530. They have been charged only with what they actually received. Of this they have no right to complain.
- 2. They contend however that from these earnings there should be made certain deductions which have not been allowed to them.

As to the first of these items, the sum of \$308.41, for the outfit furnished to the crew of the vessel on her last trip, the defendants since the argument was made in this court have waived their exceptions.

The second of these items is the sum of \$160.67, alleged to have been paid to the captain. It is charged in the account produced by the defendants as "commission on stock." The defendant B. A. Smith testified on cross-examination that this was the "captain's commission, percentage paid the captain, his wages for running the vessel." But it already had appeared that the captain and crew were to have for their pay fourfifths of the value of the catch that should be made; and there is in the testimony no further explanation of this item. It was not shown on what sum the commission was reckoned, or that there was any agreement or any custom that this allowance should be given. We may surmise facts which would justify such an expenditure, or even make it necessary; but we cannot discover either in the facts reported, or in the evidence, ground for more than a surmise. The master was unable to find on the evidence what this commission was. The court is in the same position. This item was properly disallowed.

The master found that a fair compensation for the services of the defendant B. A. Smith would be \$500, but ruled that noth-

ing should be allowed to him. The plaintiff contends that this ruling was right because the foreclosure by which the defendants gained their title was fraudulent, and they ought not to be allowed to profit by their wrongdoing. But in the opinion of the majority of the court the avoidance of the foreclosure does away with all the effects of the fraud which has been found. It was conceded at the argument that the defendants as mortgagees were entitled to the possession of the vessel. It was their duty, so far as might be, to put her to a profitable use; and we already have seen that if they had not done so they would have been responsible for whatever profits should have been realized. Smith's services have been valuable. The master has found that the earnings of the vessel have been unusually large, and her voyages very successful. The plaintiff now takes the benefit of the valuable services which have produced this advantageous result. Both upon principle and authority he should be charged with their fair value. Adams v. Brown, 7 Cush. 220. Black, 104 Mass. 400. Waterman v. Curtis, 26 Conn. 241.

The master properly refused to set off against the amount for which the defendants were found liable upon the accounting their independent demands for insurance premiums paid by them for the mortgagor. Some of these premiums were for insurance upon another vessel; none of them constituted any part of the mortgage debt, or were paid under any authority contained in the mortgage, or in the performance of any of its terms. They were wholly independent matters. Mayhew v. Martha's Vineyard National Bank, 203 Mass. 511, 515.

- 3. The master's findings as to the value of the vessel were justified by the evidence before him. Certainly they were not plainly wrong.
- 4. Interest was properly computed in the decree which was entered by the single justice.

It is unnecessary to consider the defendants' exceptions in detail. All that have been argued are covered by what has been said. The decree appealed from must be modified so as to sustain the defendants' thirteenth exception to the master's report, and to reduce the amount found in favor of the plaintiff by the sum of \$500, and so modified must be affirmed.

So ordered.

ROSA G. BOYLE vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 16, 1910. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Evidence, Papers produced on call of adverse party. Negligence. Street Railway.

The rule, which has prevailed in this Commonwealth, that, if at a trial a paper is called for and is inspected after having been produced by the adverse party, it can be used as evidence by the party producing it, does not make such a paper evidence for the party calling for it and inspecting it, and it cannot be put in evidence by that party unless it is otherwise admissible.

At the trial of an action against a corporation operating a street railway, for personal injuries sustained when the plaintiff was a passenger on a car of the defendant, which left the rails upon a disused railroad bridge, went down a bank a distance of seven feet and turned over on its side, the conductor of the car testified that as the car left the bridge and began to go down grade he "observed a grating sound and immediately the car tipped . . . took an unusual tilt and settled on its side," and it went off the bank "immediately." From another portion of the testimony of the same witness the defendant's counsel contended that the conductor made the statement that in his opinion the cause of the accident was oscillation. It was said, that a jury would be warranted in finding that the conductor would not have stated that in his opinion the cause of the accident was oscillation if he had heard the grating sound to which he testified.

TORT for personal injuries sustained by the plaintiff on August 31, 1904, when she was a passenger on an electric street car of the defendant, which was derailed upon a disused railroad bridge on Dorchester Street, in that part of Boston called South Boston, at a place where that street was being widened and its grade lowered, went down a bank a distance of seven feet and turned over on its side. Writ dated December 27, 1904.

At the trial in the Superior Court before Harris, J., the jury returned a verdict for the plaintiff in the sum of \$11,800. The defendant alleged exceptions, all of which except the one considered in the opinion have been made immaterial by the decision of this court sustaining that exception.

W. G. Thompson, (G. E. Kimball with him,) for the defendant. W. Flaherty, for the plaintiff.

LORING, J. We are of opinion that the exception must be sustained which was taken to the admission in evidence of a typewritten statement of an examination of the motorman and conductor of the car here in question. This examination was made by one Shea, who was employed in the defendant's claim department, a few days after the accident.

Just before the end of the direct examination of the motorman (who was called as a witness by the defendant), this statement of Shea's examination and the accident report made by the same two employees were marked for identification. At the end of the motorman's examination the counsel for the plaintiff asked for the "report," by which he must be taken to have meant the accident report. The counsel for the defendant objected to giving it to him then, saying that he had not a right to read it until he cross-examined, and the presiding judge said to the counsel for the plaintiff that he had no right to it unless it went in evidence. Thereupon a colloquy ensued, the meaning of which is not altogether clear. But as we construe it the counsel for the defendant said that if the report which the counsel for the plaintiff called for was to be put in evidence he would produce "the whole paper." Then the counsel for the plaintiff said that he would like the "reports and all the rest of them." Thereupon the defendant's counsel handed the plaintiff's counsel the accident report and the typewritten statement of the examination conducted by Shea. Later the counsel for the plaintiff began to read the Shea statement to the jury and, the defendant's counsel objecting, the presiding judge ruled that if a paper is called for and used "as a basis for cross-examination it goes in." To this ruling the defendant took an exception. The counsel for the plaintiff then had the conductor recalled to the witness stand and proceeded to read from the typewritten statement of Shea's examination this question as a question put by Shea to the conductor at the time Shea examined him as to the accident: "The cause of the accident in your opinion was what?" also began to read the conductor's answer to it, when the defendant's counsel objected on the ground that it was "mere theorizing." The counsel for the plaintiff stated that he proposed " to contradict his [the conductor's] statement by showing [that] he made a different statement." The defendant's counsel said that as to fact he had no objection, but that the conductor's theories were not competent. The presiding judge then made this ruling: "I think so far, he has not made any statement that tends to contradict anything he has said here. It is competent on that ground." To this the defendant excepted. Shea statement then was admitted in evidence under the defendant's exception and was read to the jury and was sent with them into the jury room.

The Shea statement was signed by Leach, the conductor, but not by Ridge the motorman. So far as Leach's statements there set forth contradicted the testimony given by Leach on the witness stand, it was competent as a written statement signed by Leach which contradicted his testimony and the defendant's counsel did not object to so much of the Shea statement being admitted in evidence. But, so far as the Shea statement contradicted Ridge, it was not competent because it never had been adopted by Ridge as his statement.

It is now contended by the plaintiff's counsel that the Shea statement was produced by the defendant upon the promise of the plaintiff to put it in evidence. While the bill of exceptions on this point is not entirely clear, we do not on the whole so construe it. And we are confirmed in this by the fact that when it was admitted in evidence it was not admitted by the presiding judge on that ground.

It is stated in Clark v. Fletcher, 1 Allen, 58, and Long v. Drew, 114 Mass. 77, on the authority of 1 Greenl. Ev. § 563, that if a paper is called for by one party and is inspected by him it becomes evidence for both parties at the trial. assume that the ruling of the presiding judge was made on the authority of that statement. But that statement of Professor Greenleaf does not mean that a party can make a paper (not otherwise competent as evidence) competent evidence in his own behalf by calling for it and inspecting it on its being produced on his call. All that is meant by that statement is that if one party calls for a paper and inspects it, it is thereby made evidence in favor but not against the party who produces it. When Professor Greenleaf said that if it is produced and inspected it becomes evidence for both parties he had in mind the case of a paper which was evidence against the party producing it, and speaking of such a case he said that if the paper is called for and inspected it becomes evidence for both parties. As we have said, there is no basis for the contention that if a paper is not competent as evidence a party can make it so by calling for it and inspecting it.

The English rule on which Clark v. Fletcher, 1 Allen, 53,

and Long v. Drew, 114 Mass. 77, were founded was without question that if a paper was called for and inspected it became evidence for but not against the party producing it. See Calvert v. Flower, 7 C. & P. 386; 3 Wigmore, Ev. § 2125, note 2.

Under the Massachusetts rule the plaintiff had no right to put the Shea statement in evidence against the objection of the defendant. The presiding judge in one portion of his charge told the jury that "the statements of two of the men have been presented to you. They are offered upon the theory, coming in that way, that they present contradictions to the statements that the witnesses have had [made] here. Whatever they contain, they are not substantive and affirmative evidence of the truth of what they contain, but they are only evidence to enable you to judge as to how much credibility you will give to the testimony upon this witness stand of that same witness whose statements they contain or purport to contain. So that in considering those, they have to be considered in conjunction with the witness who is said to have made the statement, and it is out of the statement and his whole testimony that the truth of that witness as to the story he tells, and just what effect and weight you give to it, is to be determined."

This did not cure the error in admitting the whole of the Shea statement for several reasons. In the first place none of the Shea statement was admissible to contradict Ridge. second place, so far as Leach is concerned, from what is stated in the bill of exceptions the statement must be taken to have contained matters prejudicial to the defendant other than the parts which contradicted Leach's testimony. And lastly, in a later part of his charge the judge told the jury that the Shea statement could be used as substantive evidence. He said: "In the papers that are to be submitted to you, and here and there through the evidence in the case, there are and there have been references to injuries to other people in this same accident. Those are not of any consequence as far as you are concerned, except in one single respect, and that is whether they indicate to your minds, with the other description of the falling of the car, etc., that the force that was applied to this plaintiff's person would be adequate to account for the things that she says have come to her since."

We have been asked by the defendant to reconsider the rule of practice established in Clark v. Fletcher, 1 Allen, 53, and Long v. Drew, 114 Mass. 77, on the ground that it is not founded on principle and is against the weight of modern practice. It seems to be law in Delaware, Georgia, Maine, Mississippi, Pennsylvania and Texas (see 3 Wigmore, Ev. § 2125, note 4). It has been decided not to be law in New York and Connecticut and has been repudiated by statute in California, Idaho, Iowa, Montana and Nebraska (see 8 Wigmore, § 2125, note 5); and there is some reason to suppose that it is not now law in England (see 3 Wigmore, § 2125, note 3). It has been said that the rule has been repudiated in New Hampshire. But the result of the practice authorized in Austin v. Thomson, 45 N. H. 113, is in effect the same as the Massachusetts rule. It is not necessary to go into this question in the case at bar, for if calling for and perusing a paper does not make it evidence for either party, the presiding judge was wrong in admitting the Shea statement.

We ought to add in view of a possible new trial that we do not agree with the defendant's counsel in his contention as to the statement made by Leach that in his opinion the cause of the accident was oscillation. He testified on the stand that as the car left the bridge and began to go down grade he "observed a grating sound and immediately the car tipped . . . took an unusual tilt and settled on its side," and it went off the bank "immediately." A jury would be warranted in finding that Leach would not have said that in his opinion the cause of the accident was oscillation if he had heard the grating sound which he testified to.

Exceptions sustained.

JOHN H. BURKE vs. JOHN J. DOREY & others.

Suffolk. November 29, 1910. — February 28, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Equity Jurisdiction, To reach and apply equitable assets. Equity Pleading and Practice, Appeal, Master's report. Attorney at Law.

Where a report of a master, to whom a suit in equity was referred, does not contain a report of the evidence, an appeal from a decree overruling exceptions to findings of fact by the master cannot be considered.

One, who sought the services of an attorney at law, at the attorney's request gave him a demand note for \$2,500 bearing semiannual interest and the attorney gave back a receipt stating that the note was received "for retainer, for services rendered and to be rendered" in a certain equity suit then pending, which the attorney agreed "to press...for final hearing as rapidly as possible and to make no compromise of any sort... without the assent of" the client. Thereafter the attorney "proceeded in the suit as rapidly as possible and with due fidelity." In less than six months after the date of the note and before the equity suit was brought to a final hearing, the attorney brought a suit in equity seeking to reach and apply in payment of the note certain property of the client which he alleged had been conveyed to another to avoid attachment by the client's creditors. Hald, that such suit by the attorney was not brought prematurely.

A suit in equity, to reach and apply in satisfaction of a debt due to the plaintiff property which the principal defendant was alleged to have conveyed fraudulently to a second defendant for the purpose of avoiding attachment by creditors, was referred to a master. The defendants contended that the conveyance was made in good faith to secure the second defendant for advances made by him for the first defendant. In his report the master without reporting the evidence found that the property had been conveyed fraudulently as alleged, and also found that the second defendant had paid certain obligations of the principal defendant and had given a bond to dissolve an injunction issued in another suit in equity against the principal defendant. He also refused to believe certain testimony as to obligations of the principal defendant to the second defendant and documentary evidence with regard thereto. The defendant excepted to the report on the ground that the findings of the master that the conveyance was fraudulent and that the second defendant paid out money for the principal defendant were inconsistent. Held, that the exception must be overruled because for aught that appeared the master might have found that the payments by the second defendant for the first, referred to in the report, were made pursuant to and in furtherance of the alleged fraud, which finding could not be said to have been wrong as matter of law.

If one makes a conveyance of his property with the intent of hindering, delaying or defrauding future as well as existing creditors, the property so conveyed may be reached by one, who afterwards becomes a creditor, in satisfaction of his debt although the conveyance itself did not render the debtor insolvent.

BILL IN EQUITY, filed in the Superior Court on July 28, 1909, seeking to reach and apply, in payment of a demand note for \$2,500 of the defendant Dorey to the plaintiff, the defendant Dorey's interest in a certain mortgage and mortgage note of one Mary A. Linnehan and in seventy-five shares of the capital stock of the American Sugar Refining Company, both of which the defendant Dorey was alleged to have conveyed without consideration to the defendant Bryne "upon a scheme between himself and said Dorey to prevent the same from being come at to be attached by the creditors of "Dorey.

The note of the defendant Dorey to the plaintiff was as follows:

482500.

Boston, March 15, 1909.

"For value received I John J. Dorey promise to pay to John H. Burke or order the sum of twenty-five hundred dollars on demand from this date, with interest semi-annually at the rate of five per cent. per annum, during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid.

"Witness,

"John J. Dorey."

The agreement of the plaintiff with the defendant Dorey was as follows:

"Boston March 15 1909.

"Received of John J. Dorey a note and mortgage for twenty-five hundred dollars for retainer, for services rendered & to be rendered in the equity suit now pending in the County of Suffolk, wherein Nellie A Dorey & John W. Dorey are complainants & said John J. Dorey is defendant & in which there is a cross bill filed. I agree to press the case for final hearing as rapidly as possible and to make no compromise of any sort in said suit without the assent of said John J. Dorey. This note & Mortgage is rec'd in full payment for services rendered & to be rendered in all litigation now pending between said parties

"John H. Burke."

The suit was referred to Stephen H. Tyng, Esquire, as master. Findings in the report of the master which are material to the decision are stated in the opinion. Both defendants objected and excepted to the master's report. The report was confirmed by *Pierce*, J., and a decree was made granting the prayers of the bill. Both defendants appealed. Only the defendant Bryne prosecuted his appeal in this court.

H. L. Whittlesey, for the defendant Bryne.

R. Walsworth & J. H. Burke, for the plaintiff.

MORTON, J. This is a bill to reach and apply in payment of a note on demand for \$2,500, dated March 15, 1909, given by the defendant Dorey to the plaintiff, certain property alleged to have been fraudulently conveyed by said Dorey to the defendant Bryne. The case was referred to a master. Objections were made and exceptions taken to the master's report by the defendants Dorey and Bryne. The exceptions were overruled and the

master's report confirmed, and a final decree was entered in favor of the plaintiff that the defendant Bryne held the Linnehan mortgage and note and the seventy-five shares of stock in the American Sugar Refining Company in trust and for the benefit of the defendant Dorey, and ordering him to produce, assign and deliver the same to the clerk to be sold and applied in satisfaction of the plaintiff's debt. Both the defendant Bryne and the defendant Dorey appealed. Dorey has not appeared to prosecute his appeal in this court.

The question of fraud is almost wholly one of fact. Cook v. Holbrook, 146 Mass. 66. The evidence is not before us, and so far as the exceptions to the report are based upon the contention that the findings of the master were not warranted by the evidence it is manifest that we are not in a position to pass upon the contention thus made.

At the time when the note was given, the defendant Dorey was engaged in a suit to recover some property in Somerville which he had mortgaged as security for a note of \$27,000, dated July 2, 1907, to his son John W. Dorey and his wife Nellie E. Dorey. Previous to giving the note to the plaintiff, Dorey had applied to him to act as counsel for him in that suit, and the note was given as a retainer and for services rendered and to be rendered in said suit. The plaintiff in writing agreed "to press the case for final hearing as rapidly as possible and to make no compromise . . . in said suit without the assent of said John J. Dorey." The defendant Dorey was to make payments on the note from time to time, but did not do so. This suit was begun before the case was brought to a final hearing, and one contention of the defendants is that it was prematurely brought. The master finds "that the plaintiff proceeded with said suit as rapidly as possible and with due fidelity." The note is an absolute promise to pay on demand with interest, and there is nothing in it or in the written agreement to prevent the plaintiff from bringing this suit to enforce its payment. The defendant does not, and according to the findings of the master could not, successfully, contend that the note was invalid for want of consideration.

The Linnehan mortgage was assigned by the defendant Dorey to one Skinner, his niece, in July, 1907. The master finds that it remained subject to the control of Dorey and that this and



other property, comprising a large part of what Dorey possessed, was transferred by him to prevent his creditors from attaching it. The sugar stock was transferred by him to Bryne in the latter part of 1907. The Linnehan mortgage was subsequently transferred by Skinner to Bryne, who was a nephew of Dorey, after Dorey had applied to the plaintiff to act for him in the litigation referred to above. According to the report Dorey and Bryne both contended at the hearing before the master that the Linnehan mortgage and the sugar stock with other property were transferred to Bryne to secure him for large sums of money advanced by him to Dorey from time to time, and for moneys collected by Dorey on contracts assigned to him by Bryne. Bryne testified, as stated in the report, that he and Dorey had had an accounting at one time and that Dorey had given him a note for \$7,000, which he afterwards gave up to him. He also, as the report sets out, produced thirty notes from Dorey to himself, aggregating \$5,477.25, in addition to the \$7,000 note. The master found that on January 28, 1909, the defendant Bryne settled a judgment for \$1,500, obtained against Dorey by one Augustine J. Daly, for legal services, by giving his own check for \$1,674.50, and that he also had paid another attorney employed by Dorey \$400 in settlement of his claim, and had given a bond of \$2,500 to dissolve an injunction issued in the suit of Daly against Dorey to restrain the latter from disposing of the property mentioned in the bill. The master found that Byrne had advanced to Dorey various sums of money amounting to \$3,056, which was admitted by the plaintiff. But he disbelieved Dorey and Bryne in regard to the alleged accounting and the \$7,000 note and the other notes purchased by Bryne, saying that "a careful inspection of them and other evidence satisfies me that they and said \$7,000 note were all made at one time and for the purpose of giving color to the claim that said Bryne had advanced the principal defendant [Dorey] large sums of money"; and he found "that said three mortgages, [one of which was the Linnehan mortgage] . . . said \$27,000 note of July 2, 1907, and said sugar stock were transferred by said Dorey to said Bryne to defraud, delay and hinder his creditors, and that said Bryne in taking the same knew that such was the intent of said Dorey, and that his participation in the transac-VOL. 208.

tions was solely to enable said Dorey to accomplish that intent, and preserve said property for the benefit of the principal defendant [Dorey] upon a secret trust."

The defendant contends that the finding in regard to the payments made by the defendant Bryne to and on account of Dorey are inconsistent with the finding that the property was fraudulently conveyed. But for aught that appears the master may have found that the payments and advances were made pursuant to and in furtherance of the alleged fraud. It cannot be said that if he did so find he was wrong as matter of law.

The defendant Bryne further contends that, the alleged fraudulent transfers having been made before the time when Dorey became indebted to the plaintiff and Dorey being at the time solvent, as appears from the master's report, and retaining in his hands property largely in excess of his indebtedness, the transfers in question could not be found to have been fraudulent as against the plaintiff. But a conveyance may be fraudulent in regard to subsequent creditors as well as existing creditors, if so intended. Winchester v. Charter, 12 Allen, 606. The master has found in the present case that that was the purpose with which the conveyances were made. Moreover it should be observed that the Linnehan mortgage does not appear to have been transferred to Bryne until after Dorey had retained the plaintiff.

It is suggested in the brief of the defendant Bryne that the plaintiff was not deceived in regard to the alleged fraudulent conveyance when he took the note in suit. There is no finding whether he was or was not deceived. But if he was not, we do not see how it could affect his right of recovery. It is not contended that he participated in the alleged fraudulent transfers.

The defendant Bryne argues that it is apparent from the report itself that the master came to erroneous conclusions in regard to material questions of fact. In effect the argument is that he should have believed Bryne and Dorey. But the degree of credibility to which they were entitled was plainly for the master to decide, and no appeal from or exception to his findings in relation thereto lies.

Decree affirmed.

CHARLES W. AMERIGE vs. INHABITANTS OF SAUGUS.

Essex. December 5, 1910. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Municipal Corporations, Officers and agents.

The selectmen of a town, which has accepted the provisions of R. L. c. 104, § 4, with regard to the appointment of "the superintendent of public buildings or such other officer as the . . . selectmen . . . may designate" to be inspector of buildings, have no power to fix the compensation of one whom they have appointed building inspector.

It seems, that a person appointed to be an inspector of buildings in a town which has accepted the provisions of R. L. c. 104, § 4, with regard to the appointment of "the superintendent of public buildings or such other officer as the . . . selectmen . . . may designate" to be such inspector, is not entitled to any additional compensation for the duties thus imposed upon him.

MORTON, J. This is an action of contract to recover for services rendered to the defendant by the plaintiff as a building inspector. The case was heard on agreed facts and the trial judge * found and entered judgment for the defendant. The plaintiff appealed.

At the annual town meeting in March, 1907, the defendant town, under an article in the warrant relating thereto, voted to accept Pub. Sts. c. 104. This was a mistake, it is agreed, for R. L. c. 104. After accepting the statute the town did nothing more, unless the appropriation of \$6,000 at the same meeting for "selectmen's incidentals" can be so regarded, and we do not think it can. In April following the March meeting the selectmen passed a vote appointing the plaintiff building inspector, "compensation to be determined later"; and the clerk sent him a paper to the effect that he had been appointed building inspector, "to serve from April 11, 1907, to May 1, 1908, unless said appointment shall be revoked previous to that date." There has been no revocation. In May the selectmen held a meeting and voted that the building inspector's fee should be "fixed at \$5.00 per inspection." In August of the same year the selectmen passed a vote terminating the plaintiff's compensation of

[•] Fessenden, J.

\$5 for each inspection, and leaving the compensation to be fixed at such rate as the board might from time to time determine. The plaintiff was duly notified of this vote and replied declining to assent to the action of the selectmen and claiming that he was appointed for one year at the rate which had been fixed. The plaintiff inspected twenty-five buildings after his appointment and before this action was brought.

The statute provides that in a city or town which accepts it "the superintendent of public buildings or such other officer as the mayor and aldermen . . . or the selectmen . . . may designate shall be inspector of buildings." R. L. c. 104, § 4. gives the selectmen no power to fix the compensation; and if any inference in respect to that matter is to be drawn from the requirement that the building inspector shall be the superintendent of public buildings or such other officer of the city or town as may be designated by the mayor and aldermen or selectmen, it would seem to be that it was not expected that the officer so designated would receive any additional compensation for the duties thus imposed upon him. There is no such relation between a public officer and the town or city in and for which he is elected or appointed as to entitle him merely by reason thereof to compensation. Sikes v. Hatfield, 13 Gray, 347. But however that may be, it is plain, we think, that if he is to receive compensation the matter is one which under R. L. c. 25, § 95, it is for the town and not for the selectmen to pass upon. The selectmen having had no authority to bind the town by the contract alleged to have been entered into on its behalf, and the town not having ratified or approved it, if it had the power to do so, it follows that this action against the town to recover upon the alleged contract cannot be maintained.

Judgment affirmed.

The case was submitted on briefs.

M. F. Cunningham, for the plaintiff.

H. C. Attwill, for the defendant.

ILLUSTRATED CARD AND NOVELTY COMPANY vs. PETER T. DOLAN & trustee.

Worcester. January 2, 1911. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Payment. Bills and Notes. Contract, Rescission. Practice, Civil, Tender before suit.

The mere sending, by a debtor to a creditor, of a check on a bank for an amount which the debtor contended was the amount due, and the receipt of the check by the creditor do not render the check effectual as a payment.

Evidence, that a debtor in Worcester sent to a creditor in New York a check on a bank for a sum which the debtor contended was the amount of the debt, the check having written upon it the words "In full" and a reference to the subject matter of the debt, that the creditor received the check and immediately sent it to an attorney in Worcester, who, without presenting it for payment, went to the bank upon which it was drawn, asked if there were funds there to meet it and was told that there were, and that the creditor, twenty-four days after the check was sent to him, caused an action to be brought against the debtor for what he contended was the amount of his claim against the debtor, will not warrant a finding that the creditor treated the check as payment of the debt.

If a creditor, to whom a debtor has sent a bank check for what the debtor contends is the amount of the debt, refuses to accept the check as payment and brings an action against the debtor for the amount which the creditor contends is the amount of the debt, such acts do not constitute a rescission of a contract, and therefore a return of the check, so as to place the debtor in statu quo, is not a condition precedent to the bringing of the action; but, even if it were, it is sufficient if the creditor produces the check at the trial and places it in the custody of the court.

MORTON, J. The plaintiff on March 4, 1902, sent through its attorney in New York to the defendant for collection a demand of \$269.99 against one Williams in Worcester. The defendant collected the demand in about two months, in twelve different instalments, and on May 8, by a check payable to the order of the plaintiff's attorney in New York, bearing upon its face the words "Illustrated Post Card & Novelty Co. vs. J. G. Williams. In full," remitted to the plaintiff's attorney received the check on May 9. He did not reply to the defendant nor have any communication with him, but sent the check to the plaintiff's attorney in Worcester, and on May 28 this action,

which is for the whole amount collected, was begun by a writ returnable to the Central District Court of Worcester. Before the commencement of the action the plaintiff's attorney in Worcester took the check to the bank on which it was drawn . and inquired if there were funds to meet it and was told that there were, but he did not have it cashed and it never has been cashed. The check was not tendered to the defendant, and there was no offer to return it to him before the action was begun. At the trial in the District Court the check was produced by the plaintiff and put into the custody of the court subject to the order and control of the defendant. Judgment was rendered against the defendant in the District Court and he appealed. A verdict was returned against him in the Superior Court and the case is here on exceptions by him to the refusal of the presiding judge * to give certain rulings asked for and to a portion of the judge's charge.

The defendant's contention is in substance and effect that the check operated under the circumstances as a payment of the plaintiff's demand. In order to have that effect it must appear either expressly or impliedly that the check was accepted in payment by the plaintiff. The mere sending of the check and receipt of it by the plaintiff could not render it effectual as a payment. Taylor v. Wilson, 11 Met. 44. Presentment for payment at the bank on which it was drawn and receipt of the amount would have been conclusive evidence of its acceptance by the plaintiff on the terms on which it was sent. But nothing of the sort took place. Instead, the plaintiff sent the check to its attorney in Worcester and brought suit against the defendant for the whole amount which he had collected, thus repudiating the check as plainly as possible. There was no evidence that would have warranted the jury in finding that the plaintiff treated the check as payment. The delay from May 9, when the check was received, to May 23, when suit was brought, did not of itself constitute and could not have been found to constitute an acceptance of the check. If by reason of the plaintiff's failure to notify him promptly of its refusal to accept the check the defendant had suffered any loss on account of the failure of

^{*} Sanderson, J.

the bank on which it was drawn, the plaintiff would perhaps have been liable therefor. R. L. c. 73, § 203.

The case is not one in which the plaintiff has undertaken to rescind a contract into which it had entered, and therefore the rule requiring the rescinding party to put the other in statu quo does not apply. Even if that rule did apply, it would have been sufficient for the plaintiff to produce the check, as it did, at the trial. Morse v. Woodworth, 155 Mass. 238, 249.

Exceptions overruled.

The case was submitted on briefs.

D. F. O'Connell & H. H. Lepper, for the defendant.

H. F. Harris, for the plaintiff.

JOHN McManus vs. Samuel B. Thing & others.

Suffolk. January 9, 10, 1911. — February 28, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Practice, Civil, Arrest of judgment.

Review by Braley, J., of the decisions of this court under the common law and under St. 1852, c. 812, § 22, now R. L. c. 173, § 118, with regard to motions in arrest of judgment.

At the trial of an action of tort, certain specific questions were submitted to the jury and were answered by them and, in accordance with instructions by the presiding judge, they found generally for the defendant. Thereafter and before the jury were discharged the foreman of the jury, in reply to an oral question by the judge on a material question, gave an answer which was inconsistent with the answers in writing already recorded. The plaintiff moved that certain of the answers in writing be set aside as inconsistent with the oral answer, and the defendant moved that the oral answer be set aside. The plaintiff's motions were denied and the defendant's motion was granted, and exceptions by the plaintiff were overruled by this court, who stated that "there was no inconsistency in the answers that were allowed to stand or between them and the verdict." Thereafter the plaintiff moved that the judgment be arrested because it appeared by the record that a material issue of fact, the one which was the subject of the oral question by the judge to the jury, was not settled or decided. The judge denied the motion. Held, that, the record showing no inconsistency between the special findings which had been allowed to stand and the general verdict, the defendant was entitled to judgment and the plaintiff's motion was denied properly.

TORT for personal injuries alleged to have been caused by the negligence of one Redding, who was alleged to have been a serv-

ant of the defendants, in starting a freight elevator without notice to the plaintiff, who was upon it, whereby the plaintiff's foot was caught and crushed. Writ dated July 15, 1903.

The case previously had been before this court twice. After a verdict had been rendered for the plaintiff at the first trial in the Superior Court, exceptions of the defendant were sustained in a decision reported in 194 Mass. 862.

At the second trial of the case, the presiding judge, Sherman, J., submitted certain questions to the jury, besides the general question of liability. The jury found for the defendants, and answered the special questions as follows:

- "1. Q. Was the plaintiff in the exercise of due care at the time of the accident? A. Yes.
- "2. Q. Was Redding guilty of negligence at the time of the accident? A. No.
- "3. Q. Was Redding still using the elevator when the plaintiff came on to it with his truck substantially as testified to by Redding? A. Yes.
- "4. Q. Had Redding finished using the elevator at the time the plaintiff came into it with his truck substantially as testified to by him? A. No.
- "5. Q. At the time the plaintiff was injured, was Redding acting for the defendants and within the scope of his employment? A. No."

The following colloquy then occurred between the judge and the foreman of the jury:

- "Q. (By the Judge) There is one question I want to ask you and that is whether the arrangement was that each party was to use it [the elevator] with regard to the rights of the other, or they were to use it together at the same time. Did you consider that? A. (By the Foreman) Yes.
 - "Q. What did you find? A. Just say that again.
- "Q. I told you that I wanted you to tell me whether the common use of the elevator meant in regard to the way in which it was used and in the way in which it was understood it was to be used, that one was to use it first and when they got through, then the other could use it, or whether they were to use it at the same time both together. A. Well, we came to the conclusion that both parties had the right to use it at the same time.

- "Q. You came to that conclusion? A. Yes.
- "Q. That was what was meant by common use? A. Yes.
- "Q. That is the conclusion you came to? You talked that over and concluded that that was the way? A. That was it."

The plaintiff then moved that the general verdict and the jury's answers to the second and fourth questions be set aside, and the defendants moved that the oral answer in the colloquy with the judge be set aside. The plaintiff's motions were denied and the defendants' were allowed, the judge making the following memorandum as to the answer to the oral question: "I am satisfied that the jury did not understand the question and the decision was against the evidence and the weight of evidence." Exceptions of the plaintiff to such rulings, among others, were overruled in a decision reported in 202 Mass. 11.

Thereafter the plaintiff filed the following motion: "Now comes the plaintiff in the above-entitled action, after verdict and before judgment, and moves that judgment therein be arrested upon the ground that it appears from the record that a material issue of fact,—to wit: whether or not the plaintiff and Redding had the right to use the elevator at the time of the accident,—is not settled or decided; and no judgment can be entertained [entered] in favor of the defendants until it shall have been found that the plaintiff or Redding had no right to use the elevator at the time of the accident."

At the hearing on the motion by Sherman, J., the plaintiff asked for the following rulings:

- "1. No judgment can be entered upon the findings of the jury.
- "2. The findings in favor of the plaintiff nullified and invalidated the findings in favor of the defendants.
- "8. The finding that both parties had the right to use the elevator at the same time nullifies and invalidates the finding that Redding was not guilty of negligence.
- "4. The finding that both parties had the right to use the elevator at the same time nullifies and invalidates the finding that Redding was not acting within the scope of his employment.
- "5. The setting aside of the finding that both parties had the right to use the elevator at the same time, does not validate the verdict or authorize judgment thereon."

The rulings were refused and the motion was denied. The plaintiff alleged exceptions.

C. Reno, for the plaintiff.

F. W. Eaton, for the defendants.

BRALEY, J. The court at common law by virtue of its inherent power could after verdict withhold or stay judgment, if upon the face of the record error appeared which vitiated the proceedings. But if under this rule judgment could be arrested where the declaration did not conform to the cause of action for which the writ issued, or the verdict was not in conformity with the rulings upon the issues joined, or the action could have been defeated by a general demurrer, our St. of 1851, c. 233, § 82, re-enacted in St. 1852, c. 312, § 22, now R. L. c. 173, § 118, provides that "a judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the jurisdiction of the court. After the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be considered to affect the jurisdiction of the court." 8 Bl. Com. (Sharswood's ed.) 393, 395, 399. Stevenson v. Hayden, 2 Mass. 405. Barnes v. Hurd, 11 Mass. 57. Carlisle v. Weston, 1 Met. 26. Smith v. Cleveland, 6 Met. 332, Wilson v. Coffin, 2 Cush. 316. Brown v. Webber, 6 Cush. Hollis v. Richardson, 13 Gray, 392, 393. It accordingly has been held that where the court has jurisdiction not only of the subject matter but of the parties duly served with process, judgment will not be stayed after verdict even if the writ is defective, or there is a misjoinder of counts, or the pleadings are technically insufficient, or the defendant has omitted to avail himself of a defense which would have barred the suit. Hill v. Dunham, 7 Gray, 543. Duhamell v. Ducette, 118 Mass. 569. McLaughlin v. Cowley, 127 Mass. 316. Dean v. Ross, 178 Mass. 397. Lane v. Holcomb, 182 Mass. 360.

If, however, as the plaintiff contends, the verdict of which he complains was defective in substance, or repugnant to the material issues submitted, because the question whether at the time of the accident he was lawfully using the elevator was finally left undecided, the statute is inapplicable. *McQuade* v. *O'Neil*, 15 Gray, 52, 53. Yet he can take nothing by his motion unless, at the



time of filing, the infirmities or errors complained of were affirmatively disclosed by the record itself. Sawyer v. Boston, 144 Mass. 470. To maintain his action the plaintiff was required to prove that when injured he was lawfully on the elevator, which he contends had been negligently set in motion by the defendant's servant, one Redding, and at the second trial after the decision in McManus v. Thing, 194 Mass. 862, the presiding judge submitted to the jury certain questions in writing to determine this issue. The questions and answers, with a general verdict for the defendant, had been handed to the clerk by the foreman, and presumably read by the judge, who then asked the jury, "I told you that I wanted you to tell me whether the common use of the elevator meant in regard to the way in which it was used and the way in which it was understood it was to be used, that one was to use it first and when they got through, then the other could use it, or whether they were to use it at the same time both together." The foreman answered, "Well, we came to the conclusion that both parties had the right to use it at the same time," and the general verdict was affirmed and recorded. By their answers to the questions in writing, that Redding was using the elevator at the time of the accident, and had not finished when the plaintiff came into it with his truck, the jury in effect decided, that the plaintiff was a trespasser, or a bare licensee, while by their further oral answer they found that he was rightfully there. It may be assumed for the purposes of decision, that all the questions and answers should be considered as part of the record, and have the force of special findings of fact, Hix v. Drury, 5 Pick. 296, 801. Spurr v. Shelburne, 131 Mass. 429. If the answers are treated as equally conclusive, as they must be, a vital issue, upon which the plaintiff's recovery depended, had been decided both for and against him, and until this contradiction and inconsistency, which qualified the effect of the general verdict, had been removed by further deliberation of the jury after proper instructions, it was irregularly affirmed. Roberts v. Rockbottom Co. 7 Met. 46, 49, Roche v. Ladd, 1 Allen, 486. Commonwealth v. Haskins, 128 Mass. 60. Kenney v. Habich, 137 Mass. 421, 428. It would seem to be plain that if this were the whole record, judgment could not be entered on the verdict. No exceptions having been taken to the proceedings

when the verdict was returned, the plaintiff properly moved for a new trial, and to set aside the findings and answers to some of the questions which are now immaterial, and for an arrest of judgment, while the defendant moved to set aside the answer to the verbal inquiry. Lufkin v. Hitchcock, 194 Mass. 231, 233. The plaintiff's motions having been denied, and the defendant's motion granted, the authority of the court to make the respective orders, and their validity, except as to the motion in arrest of judgment, were reviewed and affirmed on the plaintiff's exceptions in McManus v. Thing, 202 Mass. 11, 16. It is expressly decided, that after the defendant's motion had been granted "there was no inconsistency in the answers that were allowed to stand or between them and the verdict," and the decision settled the law upon the question now raised. Boyd v. Taylor, 207 Mass. 335.

The record when the present motion was filed having shown, therefore, no inconsistency between the special findings and the general verdict, the defendant was entitled to judgment, and the plaintiff's requests for rulings, which were refused, as well as his exceptions to the order denying the motion, are without merit.

Exceptions overruled.

THOMAS MEEHAN, petitioner.

Suffolk. January 13, 1911. — February 28, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Practice, Civil, Exceptions.

Under R. L. c. 178, § 110, a petition to this court to establish the truth of exceptions can be maintained only when the excepting party is aggrieved, and the grievance which the petition states must be a mistake of law or fact on the part of the judge or a neglect or failure to do his judicial duty properly. If the conduct of the judge was justifiable there is no grievance.

Upon a petition to prove a bill of exceptions it appeared that a period of more than five years elapsed between the filling of the bill of exceptions and the death of the judge who made the ruling in question, that a further period of nearly three years intervened between the death of that judge and a formal presentation of the bill of exceptions to the judge who disallowed it more than eight years after the exception was taken, that the disallowance was because the judge was unable

to find that it was conformable to the truth, and that in fact it was not conformable to the truth legally and technically and could not have been allowed properly without amendment. It further appeared that the judge who disallowed the exceptions had no knowledge of the case except from what appeared in the papers before him, which did not include a statement of all the evidence, and that the counsel for the defendant, in whose favor the ruling in question was made, had ceased to represent the defendant. Held, that, in dealing with the difficulties, which grew out of the failure of the excepting party to proceed with reasonable diligence to have his exceptions allowed, the judge was not called upon to institute measures of an extraordinary and unusual kind to find out what occurred at the trial and to give to the questions arising on the presentation of the bill of exceptions an amount of time and labor that reasonably could not be spared from the other pressing duties of his office, and consequently that it did not appear that the petitioner had been aggrieved by the action of the judge.

When an excepting party fails to proceed with reasonable diligence to have his exceptions passed upon until it has become impracticable to establish the truth of a bill of exceptions to the reasonable satisfaction of the judge to whom it is presented for allowance, such excepting party must suffer the consequences of his delay.

Knowlton, C. J. This is a petition to establish the truth of a bill of exceptions. The exception to which the petition relates was taken at a trial before a jury on March 8, 1901.* The time for filing exceptions was extended, and the bill was filed on April 15, 1901. The ruling excepted to was made by Mr. Justice Maynard, and the bill not having been allowed and a hearing being thought necessary, letters passed, at long intervals, between the counsel for the plaintiff who filed the exceptions and the judge, relative to a time and place for the hearing. Various times and places were named by the judge in his letters, in every one of which he indicated a willingness to hear the plaintiff's counsel whenever and wherever the counsel chose to come to Seemingly because these times and places did not suit the convenience of counsel, no hearing was had before Mr. Justice Maynard until shortly before his death, which occurred in May, At this hearing or conference the counsel were unable 1906. to agree as to the statement of evidence in the bill, and the judge required the plaintiff to furnish a transcript of a certain portion of the stenographic report. This transcript was promptly



^{*} The action was brought by Thomas Meehan against the city of Boston for personal injuries alleged to have been caused by an explosion of dynamite while the plaintiff was working as a day laborer in the street department of the defendant. Maynard, J., ordered a verdict for the defendant.

ordered by the plaintiff, but before a further hearing could be had Judge Maynard died.

After his death there was a hearing or conference before Mr. Justice Fox, at which it was arranged that other portions of the testimony should be procured before the exceptions were passed upon. Afterwards, on October 15, 1908, the plaintiff's counsel prepared a "bill of exceptions as revised," which was intended to be a more complete and accurate statement than that in the original bill, and at the same time filed a motion that his bill of exceptions be allowed in the revised form set forth in the draft then filed.

This revised bill was not accepted by the clerk for filing, but was handed to Mr. Justice Richardson, before whom the motion for allowance came up for hearing. The motion was denied by Mr. Justice Richardson, who handed down, with his ruling, the following memorandum: "The verdict in this case was rendered March 8, 1901. The plaintiff's bill of exceptions was filed after extensions of time therefor — on April 15, 1901. Justice Maynard, who presided at the trial, died in May, 1906. The first effort by the plaintiff to get the exceptions allowed, so far as the record shows, was made to me in October, 1908, after the counsel for the defendant at the trial had left its service. The plaintiff now asks to have his exceptions allowed in a revised form, first presented in October, 1908. The ruling of the judge who presided at the trial was that, upon the evidence, the plaintiff was not entitled to recover. Neither the original bill nor the revised form of it contains a copy or statement of all the evidence. A stenographic report of two hundred and fifty-four pages of the testimony is presented, but I am not able to say that the bill of exceptions in either form is conformable to the truth, and I deny the motion."

This revised bill is not before us, and we have no definite knowledge of its contents. There is nothing to show that the judge was wrong in the order denying the motion.

On March 15, 1909, the plaintiff presented the bill of exceptions to Mr. Justice Richardson, who indorsed upon it the following certificate of disallowance: "Mr. Justice Maynard, who presided at the trial of this case, died on May 28, 1906. This bill of exceptions was first presented to me on March 13, 1909.

I am not able to say or find that it is conformable to the truth, and I disallow it."

The petition before us is to establish the truth of the original bill of exceptions. The commissioner has reported, not only the facts already stated, but facts, and a considerable portion of the evidence, relative to the contents of the bill. From the report it appears that this was not entirely conformable to the truth, and could not properly be allowed in the form in which it was originally presented. On the other hand, it seems to have been presented in good faith, as and for a correct and proper statement of the exception, and if there had been a hearing soon after the trial, before the judge who made the ruling, there is little doubt that amendments would have been made which would have rendered the bill conformable to the truth, and would have induced the allowance of it.

The contention of the petitioner's counsel that, if there is a correct statement of the formal exceptions themselves, the bill should be allowed, notwithstanding that there is no statement of facts or evidence sufficient to enable the court to understand the questions of law involved in the exceptions, is incorrect. The exceptions must be reduced to writing, under the R. L. c. 173, § 106, and unless the bill contains a statement of facts or evidence that will enable the court intelligently to understand the questions of law, it is not a proper bill.

The petition to the full court to establish the truth of exceptions, under the R. L. c. 178, § 110, can be maintained only when the excepting party is aggrieved by the disallowance, or the failure to sign and return the exceptions, or the alteration of some statement in them. The party is aggrieved, within the meaning of this section, only when the act or omission of the judge is erroneous. The grievance which the petition must state must be a mistake of law or fact on the part of the judge, or a neglect or failure properly to do his judicial duty. The petition is in the nature of an appeal to correct an error. If the conduct of the judge was justifiable, there is no grievance, and the party in whose favor the decision is should not be put to the trouble and expense of further litigation. Horan, petitioner, 207 Mass. 256. In the present case a period of more than five years elapsed between the filing of the bill of excep-

tions and the death of the judge who made the ruling. A period of nearly three years more intervened between his death and the presentation of the bill in a formal way before the judge who disallowed it. The disallowance was more than eight years after the exception was taken. It was disallowed because the judge was not able to find that it was conformable to the truth. Plainly it was not legally and technically conformable to the truth, and it could not properly have been allowed without amendment.

The question is whether the judge is shown to be wrong in his order. The substance of his finding is that the bill was not shown to be conformable to the truth. The judge had no knowledge of the case, except that which appeared in the papers. According to the previous certificate the counsel for the defendant had left its service. If it was possible for a judge at that time and under those conditions to be put in possession of the facts and evidence, so far as to suggest or allow amendments to the bill which would make it conformable to the truth, and if the bill was so close an approximation to a proper statement that it was amendable as of right, within the liberal doctrine of our cases, the question still remains whether the judge was in error in failing to allow the bill. In a hearing of this kind, in dealing with difficulties which grow out of the failure of the excepting party to proceed with reasonable diligence to have his exceptions allowed, the judge was not called upon to institute measures of an extraordinary and unusual kind to find out what occurred at the trial, and to give to the questions arising on the presentation of this bill of exceptions an amount of time and labor that could not reasonably be spared from the other pressing duties of his office.

It is true that the statute contemplates speedy action upon a bill of exceptions by the judge to whom they are presented. R. L. c. 173, § 107. But in recent years a practice has grown up, largely for the accommodation of counsel, whereby a long time sometimes elapses before the exceptions are finally passed upon. The eight years and more, that passed in this case after the exception was taken before it was disallowed, and the nearly ten years before the petition to establish the truth of the exceptions was ripe for argument in this court, illustrate the dangers and

abuses that are liable to result from a failure of an excepting party to proceed with reasonable diligence to have his exceptions passed upon. If, for such reasons as appear in this case, it becomes impracticable to establish the truth of a bill of exceptions to the reasonable satisfaction of the judge who considers it, the excepting party must suffer the consequences.

Petition dismissed.

- E. M. Brooks, for the petitioner.
- P. Nichols, for the respondent.

COMMONWEALTH vs. JOSEPH FOSTELLO.

Norfolk. January 16, 1911. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Intoxicating Liquors. Carrier, Of goods.

Under R. L. c. 100, § 50, requiring that every person conducting a general express business and receiving spirituous or intoxicating liquors for delivery in a city or town where licenses of the first five classes are not granted "shall keep a book, and plainly enter therein" the date of the reception of each package of such liquor and other matters, and that "said book shall at all times be open to the inspection of certain officers, the book must accompany the liquors and be in the possession of the person transporting them with the entries required at each stage of their transportation from their receipt to their delivery.

MORTON, J. This was a complaint in the District Court of East Norfolk against the defendant for an alleged violation of R. L. c. 100, § 50.* The defendant was found guilty and ap-

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[•] This section is as follows: "Every railroad corporation and every person or corporation regularly and lawfully conducting a general express business, receiving spirituous or intoxicating liquor for delivery, or actually delivering intoxicating liquor to any person or place in a city or town described in the preceding section, [in which licenses of the first five classes are not granted,] shall keep a book, and plainly enter therein the date of the reception by it or him of each vessel or package of such liquor received for transportation, and a correct transcript of the marks provided for by said section, and the date of its delivery by it or him, and the name of the person to whom it was delivered shall be signed to the same as a receipt; and said book shall at all times be open to the inspection of the officers named in section twenty-seven. . . . "

pealed. In the Superior Court the case was submitted to the jury on agreed facts. There was a verdict of guilty, and the case is here on the defendant's exceptions to the refusal of the presiding judge * to make certain rulings and to give certain instructions that were requested.

At the time of the alleged offense the defendant was and had been for a long time conducting a general express business between Boston and Quincy, under R. L. c. 100, §§ 49, Licenses of the first five classes were not granted in Quincy. The defendant had a permit from the licensing board of Quincy, for the transportation of intoxicating liquors into and in Quincy. On the day named in the complaint a police officer in Quincy stopped the defendant's team and examined the merchandise upon the defendant's wagon. The wagon contained amongst other general merchandise certain vessels and packages containing intoxicating liquors which had been received by the defendant for delivery in Quincy. The vessels and packages were all plainly and legibly marked on the outside in the manner required by law. At the time when stopped the defendant was on his way to his general depot in Quincy, where the vessels and packages and the other merchandise were to be unloaded and deposited and then distributed in the ordinary course of business by the defendant's agents and delivery wagons to the persons to whom and the places at which they were consigned according to the markings on the outside. officer requested the defendant to produce the book required to be kept pursuant to the provisions of R. L. c. 100, § 50. defendant did not have with him such a book for the reason that he was on his way to his general depot where the entries required were to be made in a book kept for that purpose before actual delivery of the vessels and packages to the parties to whom they were consigned, and he was, therefore, unable to produce it.

The defendant contends in effect that it was not necessary that he should have the book with him if he was on his way with the vessels and packages to his general depot in Quincy and did not then intend to deliver said vessels and packages to the persons to whom they were consigned, nor to deliver them until

^{*} Hitchcock, J.

after entries of the vessels and packages had been made in a book kept by him for that purpose at his general depot. In other words, he contends in substance that it would have been sufficient if at some time before actual delivery the vessels and packages had been entered, according to their marks, by him in a book kept for that purpose, which the defendant or his agent would have with him at the time of delivery, and in which the vessels or packages would be receipted for by the persons to whom they were delivered.

It is no doubt possible to give to the statute, without doing great violence to it, the construction for which the defendant contends. But the statute provides that a book shall be kept which "shall at all times be open to the inspection of the officers named in section twenty-seven." The plain implication of this is, it seems to us, that the book shall accompany the liquors and be in the possession of the party transporting them, with the entries required, at each stage of the transportation from their receipt to their delivery. And we think that the statute must be so construed. As was said by Hammond, J., in Commonwealth v. Intoxicating Liquors, 172 Mass. 811, 815, "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defense that the liquors found in the possession of the carrier were for delivery by him as such to some person." See also Commonwealth v. Shea, 185 Mass. 89. The construction contended for by the defendant would add to the opportunity for unlawful delivery on the part of those so disposed instead of rendering it more difficult to violate the law. The fact that in this case the defendant had no fraudulent purpose cannot affect the result. If this construction of the statute seems to impose an undue burden upon persons and corporations engaged in a general express business, it is for the Legislature to devise a remedy.

Exceptions overruled.

The case was submitted on briefs.

T. H. Buttimer, for the defendant.

A. F. Barker, District Attorney, for the Commonwealth.

MICHAEL G. CUNNINGHAM vs. BLAKE AND KNOWLES STEAM PUMP WORKS.

Middlesex. January 27, 1911. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Negligence, Employer's liability.

In an action by a machinist against his employer for the loss of an eye from a particle flying into it from a metal maul when it was being used near the plaintiff by a fellow servant, if it appears that the defendant provided a machinist, whose duty it was to provide new mauls whenever the workmen called for them, and it is not contended that the machinist was incompetent or that the defendant failed to furnish proper materials, no breach of duty toward the plaintiff has been shown either at common law or under the employers' liability act.

In an action by a machinist against his employer for the loss of an eye from a particle flying into it from a metal maul when it was being used near the plaintiff by a fellow servant, if it appears that the fellow servant had mauls made for him as the occasion might require, that the maul which he was using at the time of the accident was unfit for service, because it was battered from use or because the handle socket had become enlarged and gave off scales, and that the fellow servant when he made use of this defective maul could have obtained a new one through means which the defendant provided, the plaintiff's injury, thus caused by the careless act of a fellow servant, cannot be attributed to the negligence of the defendant.

One, who after having served an apprenticeship with a manufacturer enters the employ of such manufacturer as a qualified machinist with full knowledge that mauls made of a certain metal alloy are used in the work, from which, even when new, particles are likely to fly after a few hours' use without impairing the effectiveness of the appliance, so that the chance of injury from flying particles is inseparable from the method of conducting the work established at that factory, assumes by his contract of employment the risk of having an eye put out by such a flying particle.

TORT for the loss of an eye sustained by the plaintiff on May 29, 1907, while employed as a machinist in the south gallery of the machine shop of the defendant at Cambridge, where he was engaged in running a lathe when the accident occurred. Writ dated November 21, 1907.

In the Superior Court the case was tried before Fox, J. At the close of the plaintiff's evidence the defendant rested and asked the judge to order a verdict in his favor. This the judge refused to do, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$6,239. By agreement

of the parties the judge reported the case for determination by this court. If as a matter of law the case rightly was submitted to the jury, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs.

M. O. Garner, for the defendant.

J. H. Vahey, P. Mansfield & J. H. Hurley, for the plaintiff.

BRALEY, J. The defendant contends there was no evidence to support the allegations of the declaration, that at the time of the accident the plaintiff was in the employ of the defendant, or to show that one Steadman, who was using the Babbitt maul,* a flying particle of which the jury could have found destroyed the sight of the plaintiff's eye, was a fellow servant, or that the defendant furnished the maul which the plaintiff alleges was a defective appliance. But it is unnecessary to decide these questions. If it be assumed, as the plaintiff asserts, that the principal questions were understood at the trial to be the due care of the plaintiff and the defendant's negligence, the evidence fails to show liability on the part of the company.

The plaintiff testified that when working as an apprentice in the employ of the defendant, he knew that Babbitt mauls were made as called for by the workmen, and, because of the softness of the metal and the use to which they were put, the faces easily became battered and the iron handles loosened in the socket. If subjected to hard usage, he said, a maul might become unsuitable "in a couple of days," and the uncontradicted evidence very plainly showed, that mauls were constantly changing as to their condition, and large and small pieces, or chips, would fly from them when brought in contact with the steel arbors, planers, and other machinery upon which they were used. The defendant was required to use reasonable diligence to supply suitable mauls, and to provide for their renewal when they became defective from use. Cormo v. Boston Bridge Works Co. 205 Mass. 336. If the defendant had undertaken to furnish a sufficient number of perfect mauls from which the workmen might select, and among the number was a defective

^{*} A maul made of a kind of metal alloy named for Isaac Babbitt, its inventor.

maul, the use of which caused the plaintiff's injury, the case at bar would come within Rosseau v. Deschenes, 203 Mass. 261. But having provided a machinist, whose duty it was to recast, and to provide new mauls whenever the men called for them, and no contention being made that the machinist was not competent or that the defendant failed to furnish proper materials, the defendant's duty to the plaintiff at common law and under the statute had been discharged. Johnson v. Boston Tow-Boat Co. 135 Mass. 209. Rogers v. Ludlow Manuf. Co. 144 Mass. 198. Thompson v. Worcester, 184 Mass. 354. Donahue v. Buck & Co. 197 Mass. 550. If Steadman, who, the plaintiff said, had the mauls made for him as the occasion might require, used the maul put in evidence, which the jury could find was unfit for service because battered from use or because the handle socket had become enlarged and gave off scales, when he could have obtained, through the means the defendant provided, a new maul, the injury was caused by the careless act of a fellow servant and could not be attributed to the negligence of the defend-Moynihan v. Hills Co. 146 Mass. 586, 589. Scanlon v. George G. Page Box Co. 205 Mass. 12, 15. It is true, as the plaintiff urges, that a new maul might have splintered after a few hours without impairing the effectiveness of the tool for further use, although making its use dangerous to employees in the vicinity. But the chance of injury from flying particles, which appears to have been wholly inseparable from the method of properly conducting the work, was a risk assumed by his contract, when, after having served his apprenticeship and with knowledge of these conditions, he entered the employ of the defendant as a qualified machinist. Gleason v. Smith, 172 Mass. 50, 52. Wolfe v. New Bedford Cordage Co. 189 Mass. 591, 593. Mutter v. Lawrence Manuf. Co. 195 Mass. 517. Simoneau v. Rice & Hutchins, 202 Mass. 82.

The rulings requested should have been given, and in accordance with the terms of the report the verdict for the plaintiff must be set aside and judgment entered for the defendant.

So ordered.

COMMONWEALTH vs. DIONISIOS SPIROPOULOS, alias JAMES MANTIR, & another.

Middlesex. January 27, 1911. — February 28, 1911.

Present: Knowlton, C. J., Morton, Loring, Bralley, & Rugg, JJ.

Evidence, Opinion: experts, Admissions and confessions.

At the trial of an indictment for the murder of a woman, whose body was found with the throat cut by some sharp instrument, which had passed almost to the spinal column, completely severing the gullet and the jugular vein, where it is an undisputed fact that the deceased was left-handed, witnesses properly qualified as experts may be allowed to testify that the character, depth and direction of the wounds were such that they could not have been self inflicted, this being a subject not so far within the ordinary experience of intelligent jurors that they would not be instructed and aided by the opinion of experts.

At the trial of two defendants, called respectively Peter and James, on an indictment for a murder alleged to have been committed by them jointly, a police detective testified that when the defendants were in a police station the defendant Peter repeated a confession, which he had made previously, that during this confession at different times the defendant James called to Peter to stop, saying. "Stop Peter! You lie! You lie! Peter, stop!", that the defendant Peter, after concluding his confession, rose from his chair and said to the other defendant "Jim, tell the truth, tell the truth. You asked me not to tell, Jim, but I had to, for God's sake Jim tell the truth. You know you cut her throat with a razor. You know her blood was on your hands," that there was a silence of two minutes of everybody in the room, and that then the lieutenant of police in charge of the station said to the defendant James, "What have you got to say to Peter's story now, Jim?" whereupon the defendant James said, "Me no talk, me no talk. I want to see my lawyer, I want to see my lawyer." The defendant James excepted to the admission of this evidence against him. Held, that the evidence was admissible against the defendant James as well as against the defendant Peter.

BRALEY, J. The defendants, who were jointly indicted and tried for the murder of one Annie Mullins, took numerous exceptions to the proceedings, but, Mantir having been convicted in the second degree and Delorey of manslaughter, they prosecute only those relating to the admission in evidence of the opinions of medical experts that from the nature and location of the mortal wounds the deceased did not commit suicide, and to the refusal of the court * to rule that certain statements made by Mantir while under arrest charged with the crime could not be considered by the jury as proof of his guilt.

[•] The case was tried before Fox and White, JJ.

We take up the questions in the order of their presentation at the argument. The cause of death was not open to conjecture. When the body was discovered, the throat was found to have been slashed in front with some sharp instrument which passed through almost to the spinal column, completely severing the gullet and jugular vein. It being undisputed that the deceased was left-handed, to rebut any possible inference that the homicide was suicidal, the medical examiners who conducted the autopsy and a physician, who viewed the body and heard their testimony of the details and whose qualifications were unquestioned, having been called by the government, were permitted to testify that from the character, depth and direction of the wounds they could not have been self inflicted. v. Johnson, 188 Mass. 382, 385, 386. It is generally recognized that in questions involving a knowledge of science and the arts, or where technical qualifications and professional skill are in issue, opinion evidence is admissible, while ordinary events associated with daily life are presumed to be understood by the jury because of their experience, without the assistance of experts. Flynn v. Boston Electric Light Co. 171 Mass. 395. Edwards v. Worcester, 172 Mass. 104. Meehan v. Holyoke Street Railway, 186 Mass. 511. Wolfe v. New Bedford Cordage Co. 189 Mass. 591. Whalen v. Rosnosky, 195 Mass. 545. Doherty v. Booth, 200 Mass. 522. Walker v. Williamson, 205 Mass. 514. It is, of course, true, that the value of such evidence must differ in degree according to the nature of the inquiry, yet in the department of medicine and surgery such testimony often is of much importance and a wide range of inquiry usually is permitted. The medical experts, from their attainments in anatomy united with the experimental knowledge acquired from study and observation of the effect of blows or wounds upon the human body, were peculiarly well fitted to express an opinion, whether the left hand and arm of the deceased could have been so moved as to have been sufficient in scope and power to have produced a blow causing a wound of the severity and dimensions found on the deceased. The facts upon which their opinion rested seem to have been satisfactorily made out, and the jury were absolutely free to give to this evidence such weight as their judgment approved. We cannot assume that the experience or

knowledge of the jurors as intelligent men versed in ordinary affairs must have been so varied and extensive that they would not be instructed and aided by this testimony, and to its admission no exception lies. Flaherty v. Powers, 107 Mass. 61, 64. Commonwealth v. Piper, 120 Mass. 185. Commonwealth v. Sinclair, 195 Mass. 100. Commonwealth v. Porn, 195 Mass. 413; S. C. 196 Mass. 826. State v. Knight, 43 Maine, 10, 130. Taylor v. Monroe, 43 Conn. 36, 44. State v. Lee, 65 Conn. 265.

The objection to the admission in evidence of what was said by the defendants when confronted at the police station,* which in view of the gravity of the crime the government concedes may be treated as exceptions duly saved, and the exceptions to the refusal to rule in the language requested, that "inasmuch as none of the answers made by the defendant . . . Mantir at the station house . . . had any tendency to show guilt on his part, and as all of his answers were explicit denials of guilt of any and all charges made against him, none of the statements



[•] The following is from the testimony of one Byrnes, a police detective, describing what took place at the North Cambridge police station which was in charge of one Gordon, a lieutenant of police: "Mantir said, 'I never was in Cambridge over night with Peter Delorey. I never was out over night with Peter Delorey. Peter lied, Peter lies!' Gordon then said to Mantir: 'I am going to bring Peter Delorey in here and have him tell you the story.' Peter was then brought back into the room, and at that time Gordon said to both Delorey and Mantir, 'Now, Peter, I am going to ask you to tell your story over again in the presence of Mantir and I want to warn both of you that anything that either one of you say or make any statement, it may be used either for or against you at your trial.' Peter says: 'I have told the truth once and I will tell it again'; and Peter then started and related his confession over again in the presence of James Mantir. During that confession at different times James Mantir called on Peter to stop, - 'Stop, Peter! You lie! You lie! Peter, stop!' After Peter got through relating the confession, he and Mantir were sitting opposite each other. He turns around in his chair and gets up. He says, 'Jim, tell the truth, tell the truth. You asked me not to tell, Jim, but I had to, for God's sake Jim tell the truth. You know you cut her throat with a razor. You know her blood was on your hands.' There was a silence of about two minutes of everybody in the room. Gordon then said to James Mantir: 'What have you got to say to Peter Delorey's story now, Jim?' Mantir says, 'Me no talk, me no talk. I want to see my lawyer, I want to see my lawyer.' At that time both Peter and James Mantir were taken out and locked in the cell."

made by . . . Delorey in his alleged confession made in his presence, and implicating him the said . . . Mantir are admissible against him," is pressed only by Mantir, as the evidence clearly · was admissible against Delorey. If a defendant while under arrest is charged with the crime by an accusation made in his presence and hearing, and he remains mute or unequivocally denies it, his silence or denial is not admissible in evidence against him. But if he makes an equivocal reply, the question or statement by which it was elicited and the answer or comment are admissible. Commonwealth v. Kenney, 12 Met. 235. Commonwealth v. Walker, 13 Allen, 570. Commonwealth v. Brown, 121 Mass. 69, 80. Commonwealth v. McDermott, 123 Mass. 440. Commonwealth v. Trefethen, 157 Mass. 180, 197. 198. We place to one side other evidence introduced by the Government, that Mantir's conduct and false statements before his arrest tended to show his connection with the murder. was said by Chief Justice Field in Commonwealth v. Trefethen, 157 Mass. 180, 199, "To argue that, by the other evidence, the defendant is shown to be probably guilty, and that therefore his denial of guilt is false, and is additional evidence against him, ought not to be permitted." The distinction is, that before arrest if he remains silent when statements are made to him or questions asked, which naturally call for a reply if he is innocent, proof of his conduct is admissible. But when under arrest he is not called upon to speak, and what he may have said or done while only under suspicion cannot be used as a reason from which to infer that proof of his silence raises a presumption of his guilt. Commonwealth v. Kenney, 12 Met. 285. Commonwealth v. Galavan, 9 Allen, 271. Commonwealth v. McDermott, 123 Mass. 440. Commonwealth v. Coughlin, 182 Mass. 558, 565. The voluntary statements or replies made by this defendant in the presence of the police officers when confronted with Delorey, who then repeated the confession previously made by him which implicated Mantir as the perpetrator of the murder, were not unequivocal denials, but from the very form of expression were susceptible of more than one consistent Commonwealth v. Chance, 174 Mass. 245, 248, interpretation. 249. Commonwealth v. Brown, 121 Mass. 69, 80.

It was correctly left to the jury under well guarded instruc-

tions to decide, whether Mantir's command or request to Delorey to stop the narrative and the accompanying assertions that it was false, were elicited because the statements were true or whether from Mantir's point of view Delorey was lying for his own advantage in accusing him as the instigator of the murder and the person by whose hand it was finally accomplished. Graham v. Middleby, 185 Mass. 849, 854. The rights of each defendant having been fully preserved, no error of law appears, and their conviction must stand.

Exceptions overruled.

- H. H. Winslow, (J. A. E. Moroney & F. McDermott with him,) for the defendants.
 - J. J. Higgins, District Attorney, for the Commonwealth.

JOHN NOBLE, administrator, vs. JOSEPH BURNETT COMPANY & others.

Suffolk. November 29, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Equity Jurisdiction, Accounting. Contract, Validity. Partnership. Corporation. Equity Pleading and Practice, Bill. Words, "A fair and equitable share."

A bill in equity by the administrator of the estate of a chemist against the surviving members of a certain copartnership alleged that the chemist made a contract with the copartnership by the provisions of which the chemist was to devote his time and skill to producing formulas of a certain kind "for the mutual benefit of himself and said copartnership" and to permit the copartnership to make use of the formulas for manufacturing purposes, and the copartnership was to manufacture and put upon the market compounds made in accordance with such of the formulas as they believed capable of yielding a profit and to pay the chemist "a fair and equitable share of the net profits"; that the chemist performed his part of the contract, and that, although there were large profits realized from the enterprise by the copartnership, the defendants refused to account therefor to the plaintiff; that an accounting would be an extremely complicated and difficult matter and that the common law would afford no adequate and complete relief. There was a prayer for an accounting and for an order for a payment to the plaintiff of what was due him as administrator. The defendants demurred to the bill. Held, that there was nothing to show that the rule for ascertaining the chemist's share of the net profits, "a fair and equitable share," was so indefinite or that its application was so impracticable that it could not be applied with



reasonable certainty to the circumstances under which the profits were made; and that equity had jurisdiction to compel the defendants to account, irrespective of the question whether under the contract the chemist and the copartnership became partners.

- If the surviving members of a copartnership, to whom a chemist had entrusted certain formulas in the nature of trade secrets under a contract whereby the copartnership was to manufacture and sell compounds made from the formulas and share the profits with the chemist, form a corporation of which they are the president, treasurer, a majority of the board of directors and the owners of the controlling shares of the capital stock, and then convey the formulas to the corporation which continues to use them without accounting to the chemist for profits actually realized, the corporation receives the formulas and uses them with full knowledge of the breach of trust of the copartnership and must be held to hold and to use them subject to the same trust under which they were held by the copartnership; and therefore after the death of the chemist, the administrator of his estate may maintain a bill in equity to compel the corporation to account for the chemist's share of the net profits realized by the corporation in his lifetime.
- A bill in equity, by the administrator of the estate of a chemist against the surviving members of a copartnership and a corporation, alleged in substance that the chemist had made a contract with the copartnership by which he entrusted to them certain formulas under an agreement that they should manufacture and sell compounds made from such formulas and should divide with him the net profits thereof, that the copartnership realized profits but did not account to the chemist, denying that there were any profits, that, one of the copartnership having died, the individual defendants, who were the surviving partners, formed the defendant corporation, they being its president, treasurer, a majority of its board of directors and the owners of the controlling interest of the capital stock, that the individual defendants as surviving copartners conveyed the formulas to the corporation, which used them and realized profits, but refused to account to the chemist or to the plaintiff. The prayers of the bill were for an accounting, injunctions against the divulging of the formulas, a determination of the plaintiff's rights as to the formulas and a decree that the corporation be required to recognize those rights. Held, that the bill was not multifarious, the fundamental question being the interest of the chemist in the formulas and all the defendants being interested directly in that question.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 16, 1909, and amended on March 11 and April 1, 1910, by the administrator with the will annexed of the estate not already administered of George F. H. Markoe, late of Boston, against the Joseph Burnett Company, Robert M. Burnett and Harry Burnett. The allegations of the bill were in substance as follows:

The plaintiff's testator was by profession an apothecary and chemist, the dean of the Massachusetts College of Pharmacy, and a member and officer of various scientific societies. He had for many years made a special study of food chemistry, especially that branch pertaining to the subject of essences, flavoring ex-

tracts, coloring matters for food stuffs, which was at that time little known, and to the subject of perfumery, and had made valuable discoveries and had acquired expert knowledge and an international reputation in those branches of chemical science.

The defendant the Joseph Burnett Company is a Massachusetts corporation, incorporated in 1895, with its principal place of business in Boston and is engaged in the manufacture and sale of flavoring extracts, essences, and coloring materials used in the preparation of foods, and in the manufacture of such extracts, essences, and coloring materials it was using at the time of the commencement of the suit, and since the time of its incorporation had used, certain secret processes and formulas acquired at or about the time of its incorporation from the copartnership, Joseph Burnett and Company, which had had its principal place of business in said Boston. The firm of Joseph Burnett and Company at the time of the incorporation of the Joseph Burnett Company was composed of the defendants Robert M. Burnett and Harry Burnett as surviving partners, who became the corporation's president and treasurer, respectively, and a majority of its board of directors and the holders of a large part of the capital stock. The capital stock of the corporation was issued to be used "in the purchase from the surviving partners of Joseph Burnett and Company (with the assent and ratification of the executors of Joseph Burnett, deceased) all of the merchandise, machinery, fittings, good will, proprietary property, trade marks, processes, secrets, cash, accounts receivable, claims and all other assets whatsoever of said firm. The corporation to assume all contracts and debts of said copartnership, and take over the business as from and after August 11, 1894, and to ratify all acts, and payments, and to bear all losses and to hold all profits since that time."

The plaintiff alleged on information and belief that some time about the year 1889 the plaintiff's testator and the copartnership Joseph Burnett and Company (then composed of Joseph Burnett, now deceased, and the respondents Harry Burnett and Robert M. Burnett) entered into a contract whereby the plaintiff's testator undertook and promised to devote his time, energy, skill, reputation, and special knowledge to experimentation in the subject of flavoring extracts, essences, coloring matters for food, and

perfumery, and similar things, for the mutual benefit of himself and said copartnership; and to permit the copartnership to make use of any of the processes, recipes or formulas he might thereafter invent, discover or improve. And the firm undertook and promised to manufacture and put on the market such of these processes to be invented, discovered or improved by the plaintiff's testator as they might believe capable of yielding a profit under proper business exploitation, and further promised to pay to him or his legal representatives a fair and equitable share of the net profits realized by the sales of flavoring extracts and coloring matters for foods manufactured under processes and formulas to be discovered by the plaintiff's testator; and, in consideration of certain other work which he was to do for said firm in connection with their established manufacture under their own recipes and to enable him to carry on his experimentation until such time as the formulas to be devised by him might be put on the market and yield him a fair return, said firm agreed to and did pay the plaintiff's testator a small monthly sum.

Thereupon the plaintiff's testator "sold out and retired from a lucrative business as druggist and apothecary of which he had for many years been proprietor, gave up his established practice as consultant in pharmacy and food chemistry, and in accordance with the terms of the contract from about 1889 until September 24, 1896, when he died, devoted his whole time, skill, energy, knowledge and reputation to experimentation in flavoring extracts and essences, coloring matters for foods, and perfumery, and discovered, invented and improved from time to time a variety of new, valuable and useful processes for the production and manufacture of such flavoring extracts, essences, coloring matters for food stuffs and perfumery which were considered in the judgment of the defendants to be, and which in fact were, capable of profitable commercial exploitation, and the plaintiff's testator in every respect fulfilled, and was at all times ready to fulfil, all obligations undertaken by him in consequence of said agreement."

In pursuance of the objects for which it was incorporated and with full knowledge of the agreement of the plaintiff's testator with the firm and of all his rights in the processes and secrets



invented, discovered and improved by him, the defendant Joseph Burnett Company acquired from the defendants Robert M. and Harry Burnett, as surviving partners of Joseph Burnett and Company and with the assent and ratification of the executors of the will of Joseph Burnett, all their proprietary property, trademarks, processes and secrets, including those for flavoring extracts and essences, coloring matters for food stuffs, and perfumery discovered, invented and improved by the plaintiff's testator, and succeeded to the rights and assumed all the obligations and liabilities under the agreement between the plaintiff's testator and the firm.

On information and belief the plaintiff further alleged that, shortly after the making of the agreement with the plaintiff's testator, the copartnership, and on and after August 11, 1894, the corporation, began to use, and continued to use down to the institution of this suit, a large number of secret processes and formulas discovered and invented by the plaintiff's testator, and by means thereof to manufacture and sell flavoring extracts, essences, and coloring matters for food stuffs, and perfumery, continuously had been engaged extensively in the manufacture and sale of said products, and had made large profits thereby, and still had the exclusive use and benefit of certain of said secret processes and formulas; that such flavoring extracts, essences and coloring matters for food manufactured under the processes and formulas discovered, invented and improved by the plaintiff's testator began to be widely marketed and to yield a large profit over the cost of production before his death, but that the defendants failed to disclose, concealed from the plaintiff's testator and his executor and denied the fact that any profit whatever had been realized; that because of the representations of the defendants the plaintiff's testator died ignorant of the fact that the products were being marketed at a profit and without having received from the defendants the share, or any part of the share, of such profits which ought to have been paid to him in accordance with said agreement.

After the death of the plaintiff's testator, the executor of his will requested that the defendants account for his share of the net profits due him and his estate, but the defendants denied that there were any profits.

Shortly after his appointment as administrator the plaintiff requested the defendant Harry Burnett, as treasurer of the defendant corporation and as a surviving partner of the firm of Joseph Burnett and Company, to account to him for net profits due the estate of the plaintiff's testator, but he, in behalf of the defendant corporation and the copartnership, though admitting that such profits had been made, refused to pay over any sum as profits or to make any accounting whatever.

On information and belief the plaintiff further alleged that neither George F. H. Markoe nor the executor of his will nor any person interested in the testator's estate ever was informed or believed or had reason to apprehend that the defendants denied or intended to deny their obligations under their agreement with the said Markoe; and that neither the plaintiff nor any of the above named persons learned that the defendants intended to deny said obligations until their refusal to account as above stated. Soon after the death of the plaintiff's testator the defendant Harry Burnett was appointed trustee of the residue of his estate, which was given by his will upon certain trusts, and continued to act as such trustee until July 16, 1908, when he resigned the office. Throughout the time of his trusteeship he acted as advisor to the executor of said will, and after the year 1900, when the executor went to live permanently in New York, and until the appointment of the plaintiff as administrator, Harry Burnett assumed and exercised full control over the administration of the estate.

On information and belief the plaintiff further alleged that the flavoring extracts, essences, coloring matters and perfumery manufactured under the processes, recipes and formulas discovered and invented by the plaintiff's testator were placed upon the market by the defendants some time before his death; that they yielded a profit before his death; that the sales thereof had greatly increased since his death; and that all such articles have been sold in very large and increasing quantities throughout the United States and other countries, and have yielded to the defendants from time to time, and still are yielding, very extensive profits over and above the cost of production; that an accounting would be an extremely complicated and difficult matter, and the common law for that and for other reasons

would afford the plaintiff no adequate and complete relief in the premises.

The prayers of the bill were for an accounting, for injunctions restraining the defendants from selling, assigning, transferring, disposing of or making known to any person, firm or corporation the processes, recipes and formulas discovered or invented by the plaintiff's testator and previously described; that the right, title and interest of the plaintiff in the recipes, formulas and processes might be ascertained and established, and that the defendant corporation might be decreed to hold the same in trust for the plaintiff as administrator to the extent of his interest therein, or that the value thereof might be ascertained and established and ordered to be paid over to him; and for general relief.

The individual defendants and the defendant corporation demurred severally upon the ground that the bill disclosed no ground for proceedings in equity, and also on the ground that the bill was multifarious, "in that it proceeds and relies upon two separate and distinct grounds of relief against separate and distinct defendants, namely, it proceeds and asks relief against these defendants upon an alleged agreement with them as copartners, and it proceeds and asks relief against the Joseph Burnett Company upon an alleged contract between these defendants and said company, of which the plaintiff may be a beneficiary, but to which neither he nor his testator were parties."

The demurrers were heard by Sheldon, J., who overruled them, and, being of opinion that the questions involved so affected the merits of the controversy that the matters ought, before further proceedings, to be determined by the full court, he reported the questions raised by the demurrers for that purpose and stayed all further proceedings.

J. Noble, (H. M. Channing & F. R. Boyd with him,) for the plaintiff.

C. F. Choate, Jr., for the defendants.

HAMMOND, J. Under the original contract with Joseph Burnett and Company, Markoe was to devote his time and skill to produce formulas of the kind therein specified, "for the mutual benefit of himself and said copartnership," and to permit the firm to make use of the formulas for manufacturing purposes.

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And the firm was to manufacture and put upon the market such compounds made in accordance with any of these formulas as they believed capable of yielding a profit, and to pay Markoe "a fair and equitable share of the net profits." The bill alleges that an accounting would be an extremely complicated and difficult matter, and that the common law for that and other reasons would afford no adequate and complete relief. Under these circumstances it is manifest that if the plaintiff is entitled to any portion of the net profits, equity has jurisdiction at least against the defendants, who are the surviving partners of the old firm of Joseph Burnett and Company; and this is so, irrespective of the question whether or not under the agreement the contracting parties became partners. Pratt v. Tuttle, 136 Mass. 233, and cases cited. Hallett v. Cumston, 110 Mass. 32.

But it is contended by the defendants that the agreement is too indefinite to be enforced. In support of this contention they argue that what is a fair and equitable share of the net profits cannot be determined and hence the plaintiff can have nothing. The allegations of the bill show that this work was done by Markoe not gratuitously, but under a promise to receive a portion of the proceeds. The work has been done and the bill alleges . that great profits have accrued, and the only thing to be done is for the defendants to pay over a fair and equitable share The plaintiff does not call upon the court to state the rule in accordance with which the profits already obtained and now in the hands of the defendants shall be divided. The contract itself states the rule — a fair and equitable share. The plaintiff simply asks that this rule shall be applied not to future probabilities but to past facts. There is nothing to show that the rule is so indefinite or that its application is so impracticable that it cannot be applied with reasonable certainty to the circumstances under which the profits were made. See McMurtrie v. Guiler, 183 Mass. 451, 454. The case is clearly distinguishable from Marble v. Standard Oil Co. 169 Mass. 553. And the same may be said of Fairplay School Township v. O'Neal, 127 Ind. 95; Des Moines v. Des Moines Waterworks Co. 95 Iowa, 348; Faulkner v. Des Moines Drug Co. 117 Iowa, 120; and Pulliam v. Schimpf, 109 Ala. 179; all of which are cited by the defendants. It is next contended in support to the demurrer that in no

event can the defendant corporation be held. In support of this it is urged that the bill does not set forth any contract between Markoe and the corporation, that in this Commonwealth the beneficiary of a contract cannot sue the obligor at law or in equity, that there has been no novation, and "no new consideration for any new contract with the corporation," and further that none of these processes was patented, that they were all merely trade secrets and that, if the owner of a trade secret divulges it without imposing restrictions against its divulgence by his confidant to another, any one who through the confidant or otherwise gets knowledge of the secret can do with it as he chooses.

We do not understand the plaintiff to put his case upon the doctrine of a new contract. The bill sets out that these formulas were for the mutual benefit of Markoe and the old firm, and that he was to permit the firm to make use of them. There is no allegation that they were the property of the firm, but the whole framework of the bill is that the property in the formulas remained in part at least in the plaintiff, and moreover that the formulas were to be regarded as trade secrets. The firm had the possession of the formulas for a limited purpose only, and could not properly as against Markoe divulge them. To divulge them was a breach of trust. The corporation was not a purchaser without notice. Its officers and organizers were members of the firm, and they held nearly all the stock. Their knowledge was the knowledge of the corporation. They knew Markoe's rights and the limitation of their own rights. With full knowledge of these rights and limitations the corporation took the formulas and used them. In other words it received, with full knowledge that the conveyance from the old firm was a breach of trust, the formulas. Under these circumstances it must be held to hold the formulas on the same trust as that on which they had been held by the old firm. See Loring v. Brodie, 134 Mass. 453, and cases cited. Nor is there anything inconsistent with this in Pratt v. Tuttle, 136 Mass. 233, upon which the defendants rely. In that case the corporation was the mere agent of the original contractors, nor was it charged that the corporation had profits in its hand in which the plaintiffs had an interest. In the present case it is alleged that the corporation as the purchaser from the firm has used the formulas and has profits in its hands.

The bill is not multifarious. The fundamental question respects the interest of Markoe in the formulas, and in this question all the defendants are directly interested. That is the trunk, of which the respective liabilities of the corporation and the other defendants are the separate branches. "It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others." Brown v. Guarantee Trust & Safe Deposit Co. 128 U. S. 403, 412, and cases cited. Andrews v. Tuttle-Smith Co. 191 Mass. 461, and cases cited.

The orders overruling the demurrers are affirmed; and in accordance with the terms of the report the defendants are to plead or answer.

So ordered.

ELLA M. SPOFFORD & another vs. STATE LOAN COMPANY.

Suffolk. November 29, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Small Loans Act. Mortgage, Of personal property. Statute, Construction. Release.

R. L. c. 102, § 51, provides that "a loan of less than one thousand dollars shall be discharged upon payment or tender by the debtor of the principal sum actually borrowed and interest at the rate of eighteen per cent per annum from the time said money was borrowed and a sum not exceeding five dollars for the actual expenses of making and securing the loan; but the lender shall be entitled to interest for six months at said rate if the debt is paid before the expiration of that period. All payments in excess of said rate shall be applied to the discharge of the principal, and the borrower shall be obliged to pay or tender only the balance of the principal and interest, at said rate, due after such application." Held, that these provisions do not render it illegal for a lender to ask for and receive interest on a loan of less than \$1,000 at a rate greater than eighteen per cent.

If one, who had borrowed \$405 and had given therefor his note bearing interest at four per cent per month and a mortgage on his household furniture as security, is unable to pay the note when it comes due and the lender insists upon foreclosing the mortgage unless the borrower will execute and deliver a new note payable in one month for the amount due on the former note, bearing interest at the same rate and secured by a new mortgage on the furniture, and also a release of all demands and particularly of all rights under R. L. c. 102, §§ 51, 52, and the borrower accedes to the lender's requirements, such release, note and mortgage are valid, and although, in a series of such transactions the borrower may

have paid to the lender a sum far in excess of the amount of the original loan plus eighteen per cent interest per year, and there still are outstanding a mortgage and mortgage note for \$335 and interest at four per cent per month, the borrower cannot insist under R. L. c. 102, § 51, that all payments made under all the notes in excess of the rate of eighteen per cent per year "shall be applied to the discharge of the principal," since all the mortgages but the last were transactions which were closed by the releases, and therefore the borrower only can insist upon the statute being applied to the last mortgage.

R. L. c. 102, § 51, provides that "a loan of less than one thousand dollars shall be discharged upon payment or tender by the debtor of the principal sum actually borrowed and interest at the rate of eighteen per cent per annum from the time said money was borrowed and a sum not exceeding five dollars for the actual expenses of making and securing the loan; but the lender shall be entitled to interest for six months at said rate if the debt is paid before the expiration of that period. All payments in excess of said rate shall be applied to the discharge of the principal, and the borrower shall be obliged to pay or tender only the balance of the principal and interest, at said rate, due after such application." Held, that the statute was intended for the benefit of the borrower, who may if he chooses relinquish any rights that at any time may have accrued to him under its provisions.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 1, 1910, and subsequently amended, seeking to enjoin the defendant from foreclosing a mortgage upon household furniture of the plaintiffs, and to compel the cancellation of the mortgage or its redemption.

The case was heard by Loring, J. It appeared that on July 28, 1903, the plaintiffs borrowed \$405 from the defendant, giving as security for the loan a mortgage on their household furniture, the mortgage note being payable in one month and bearing interest at the rate of four percent a month; that, during the interval between July 28, 1903, and the commencement of the suit, the plaintiffs had given ten successive mortgage notes secured by mortgages on the furniture to the defendant, each note being for an amount of principal and interest overdue on the previous note, bearing the same rate of interest and being payable in one month, the preceding note in each instance being returned to the plaintiffs and the preceding mortgage discharged when the new note was given, and the plaintiffs in each instance executing and delivering to the defendant a release of all demands, and particularly of all rights under R. L. c. 102, §§ 51, 52. The total amount paid by the plaintiffs to the defendant in the transactions was \$877.17.

At the time of the bringing of the suit, there was undis-

charged a mortgage for \$335 dated June 7, 1909, securing a note of that date bearing interest at four per cent per month, on which nothing had been paid.

The single justice filed the following memorandum:

- "I regret to have to come to the conclusion that I cannot give the plaintiffs the relief in this case for which they ask. R. L. c. 102, § 51, does not forbid the making of a loan at the rate of forty-eight per cent a year; all that it provides is that a loan for less than \$1,000 shall be discharged upon payment or tender of the sum actually borrowed, with interest at the rate of eighteen per cent a year, plus a sum not exceeding \$5 for the actual expenses of making and securing the loan; provided, however, that in any event the holder is entitled to interest equal to nine per cent of the sum lent.
- "When six months had expired I do not see why the defendant had not a legal right to take the position that the plaintiffs must pay or begin a new transaction. The advantage to the defendant and the burden on the plaintiffs in case a new transaction was entered upon was that at least nine per cent interest would have to be paid in place of interest at the rate of eighteen per cent a year until the day when payment or tender was made.
- "The defendant did take that position. In taking that position the defendant was insisting on his legal rights. He was not making a representation... No false representation or other fraud was committed by him. A new loan was made, the old loan was paid with the proceeds of the new loan, and the plaintiffs released the defendant from all rights up to date of the release.
- "There is no evidence on which I can find that the release was void or obtained by fraud.
- "The defendant, in effect, insisted that the plaintiffs should stand to him where they would have stood to a third person had the plaintiffs procured a new loan from a third person on the same terms and used the proceeds in paying off his mortgage. He had papers drawn to carry that into effect, they were executed, and that is the end of the plaintiffs' case.
- "It is plain that in spite of R. L. c. 102, § 51, usurers can still extort unconscionable sums from necessitous borrowers of

money. But the relief must come from the Legislature, if any relief in such cases is to be given. The court must enforce the legal contract entered into by the parties.

"But the plaintiffs are entitled to redeem the last mortgage for \$335 given on June 7, 1909, on payment of that sum with interest from June 7, 1909, at the rate of eighteen per cent per year, plus \$2, the actual expense of making and securing the loan."

A decree was entered accordingly; and the plaintiffs appealed.

C. S. Ward, for the plaintiffs.

A. K. Cohen, for the defendant.

MORTON, J. This is apparently a case of hardship for the plaintiffs. We say apparently because it is possible that the situation in which the plaintiffs find themselves may be due to their own extravagance or imprudence.

The plaintiffs contend that the releases which were given by them before the giving of the mortgage now in question were null and void; and the defendant conceded at the hearing before the single justice that if they were, then the excess which it had received over and above the statutory rate of eighteen per cent entitled the plaintiffs to a discharge of the mortgage. The single justice found that the releases had not been obtained by fraud, and ruled in effect that they were valid and binding on the plaintiffs. A decree was thereupon entered, after the plaintiffs had amended their bill, allowing them to redeem the outstanding mortgage upon paying the principal sum of \$335 secured by the mortgage, with interest at the rate of eighteen per cent to the date of payment. The plaintiffs appealed. We think that the ruling and finding were right.

The amount borrowed and for which the original mortgage was given was \$405. There is nothing in the statute (R. L. c. 102, § 51) which renders it illegal for the lender to ask for and receive more than eighteen per cent interest when the amount borrowed is less than \$1,000. As the single justice said (we quote from his memorandum of decision which is printed with the papers in the case): "R. L. c. 102, § 51, does not forbid the making of a loan at the rate of forty-eight per cent a year; all that it provides is that a loan for less than \$1,000 shall be discharged upon payment or tender of the sum actually

borrowed, with interest at the rate of eighteen per cent a year, plus a sum not exceeding \$5 for the actual expenses of making and securing the loan; provided, however, that in any event the holder is entitled to interest equal to nine per cent of the sum lent." At the expiration of every six months, when the sum secured by the mortgage fell due, the defendant had a right to demand payment, and, if the sum due was not paid, to foreclose the mortgage. If the plaintiffs could not pay or did not want to pay the amount due, or make a tender as provided by the statute, the parties could agree, upon such terms as they saw fit, to a renewal of the mortgage and a discharge of the old one and a release of any and all claims which the plaintiffs might have against the defendant under the statute or otherwise. There was nothing unlawful in such an arrangement whatever the rate of interest agreed upon might be. The statute being intended for the benefit of the borrower, the plaintiffs if they chose could relinquish any rights that had accrued to them under it. Wall v. Metropolitan Stock Exchange, 168 Mass, 282. It is possible, of course, that the Legislature has left open a door which they meant to shut, but if so, it is for them and not for us to close it.

There is nothing to show that any fraud or misrepresentation was practised upon the plaintiffs by the defendant, or that there was any suppression intentional or otherwise of information which should have been communicated by the defendant to the plaintiffs.

Decree affirmed.

JAMES H. VAHEY, executor, & another, vs. HENRY J. BIGELOW & another.

Suffolk. December 2, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Practice, Civil, Findings by trial judge, Exceptions. Mortgage, Of real estate: fore-closure. Evidence, Presumptions and burden of proof.

Where a judge, who, without a jury, hears an action of contract, finds for the plaintiff, and the defendant alleges exceptions, such finding is to stand if it is warranted in law upon any possible view of the evidence.

In an action by a mortgagee of real estate against the mortgagor to recover a balance remaining due upon the mortgage note after a sale of the mortgaged property under a power of sale in the mortgage, if the mortgagor contends that the sale was not made in good faith and was not properly conducted, the burden is upon him to establish that contention.

The provision in a mortgage of real estate giving the mortgagee power to sell the mortgaged property in case of default by the mortgagor in the performance of the conditions of the mortgage did not require the mortgagee to give to the mortgagor notice of an intended foreclosure sale. The mortgagee foreclosed the mortgage under the power of sale and complied strictly with the provisions of the mortgage with regard thereto. The evidence as to whether there was a notice given to the mortgagor was conflicting, an attorney who acted for the mortgages and purchaser in his behalf testifying that it was "his remembrance" that such notice was given, and there being "direct, affirmative and positive evidence" that no such notice was given. There was no effort made to advertise the sale beyond the required foreclosure notice in a newspaper. There were but ten persons at the sale and only one bid, which was made by the attorney of the mortgagee. The property was sold for \$7,200, and its fair market value at the time was \$10,000. The mortgagor had sold his interest in the mortgaged property two years before the sale. After the sale there was still due to the mortgagee on the mortgage note \$3,488 for which he brought an action against the mortgagor, who contended that the sale was not conducted properly or in good faith and that there should have been no deficiency. The case was tried before a judge without a jury and the foregoing facts were in evidence. The defendant made no special requests for findings but asked the judge to rule that as matter of law the plaintiff could not recover. The ruling was refused, the judge found for the plaintiff, and the defendant alleged exceptions. Held, that the exception must be overruled, since on the evidence the judge was warranted in finding that the sale was conducted by the plaintiff properly and in good faith.

Where at the trial before a judge without a jury of an action for \$3,488, a balance alleged to be due upon a note secured by a mortgage upon real estate after a sale in foreclosure of the mortgage, the defendant merely asks the judge to rule that as matter of law the plaintiff cannot recover, and, the ruling being refused and the judge finding for the plaintiff, alleges an exception merely to the re-

fusal to give the ruling, no question as to whether an amount of \$1,262, which was paid by the plaintiff as taxes upon the mortgaged property before foreclosure, properly was included in the finding, is brought before this court.

CONTRACT for \$8,488.21, a balance alleged to be due upon a promissory note secured by a mortgage upon real estate after a foreclosure of the mortgage and sale of the real estate under the power of sale contained in the mortgage. Writ dated July 80, 1907.

The action originally was brought by Marvel J. Conant and Willis S. Vincent against Henry J., Lewis H. and Samuel B. Bigelow. Conant died before the finding of the judge, and James H. Vahey, the executor of his will, was allowed to appear and prosecute the action in his stead.

The answers of the defendants alleged that the foreclosure sale "was not properly conducted and that by reason of the failure of the said plaintiffs properly and fairly to conduct said sale and by reason further of their failure to notify this defendant and others, and by reason further of their lack of good faith in the conduct of the sale there was not realized at said sale all that the property secured by said mortgage was fairly worth and that on account of said improper and unfair methods used by the plaintiffs they did not receive the fair market value of said property which at the time of said sale was far in excess of the amount due, if any, upon said note, wherefore this defendant owes the plaintiffs nothing."

The case was heard by Hardy, J., without a jury.

The power of sale in the mortgage was as follows: "But upon any default in the performance or observance of the foregoing condition, the grantees or their executors; administrators or assigns may sell the granted premises, or such portion thereof as may remain subject to this mortgage in case of any partial release hereof, together with all improvements that be thereon, at public auction in said Boston, first publishing a notice of the time and place of sale once each week for three successive weeks in some one newspaper published in said Boston, the first publication of such notice to be not less than twenty-one days before the day of sale and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar us and all persons claiming under

us from all right and interest in the granted premises, whether at law or in equity."

Other material facts are stated in the opinion. The judge found for the defendant Samuel B. Bigelow because the claim against him was barred by a discharge in bankruptcy. He found for the plaintiffs in the sum of \$4,004.47 against Henry J. and Lewis H. Bigelow; and those defendants alleged exceptions.

E. C. Stone, for the defendants.

J. H. Vahey, (P. Mansfield with him,) for the plaintiffs.

HAMMOND, J. This is an action against the makers of a promissory note secured by a power of sale mortgage of real estate, to recover a balance alleged to be due after applying towards the payment of the note the proceeds of the sale of the security. The case was tried in the Superior Court without a jury. At the close of the evidence the defendants asked the judge to rule as matter of law that the plaintiffs were not entitled to recover. The judge refused so to rule, and having so refused found for the plaintiffs in the sum of \$4,004.47. The defendants made no special requests for findings either upon the question of notice or upon the manner of foreclosing; and the only question raised upon the record is whether the ruling requested should have been given.

The sale was advertised as required in the power of sale. "No further advertising was done. No posters were printed and none was put up in a public place. No handbills were distributed. No prospective purchasers were notified or sought, All that was done was a mere literal or bare compliance with the power contained in the mortgage, except as appears from the testimony of Richards" as to notice to the defendants. There were "not more than ten present at the sale, and the only bid made was that of . . . Richards of \$7,200." At the time of the foreclosure neither of the defendants had any interest in the real estate described in the mortgage, each having sold out more than two years before. Richards, who throughout the foreclosure proceedings acted as the attorney of the plaintiff and who took his deed as such, testified in substance that "his remembrance" was that before the sale he notified each of the defendants by sending a copy of the advertisement thereof. There was however "direct, affirmative and positive

evidence... tending to show that the ... defendants never received any notice of the sale." On the question whether any such notice was given or received, the evidence was conflicting and would warrant a finding either way. It was a question of fact for the decision of the judge as the trier of fact. The fair market value of the property at the time of the foreclosure sale was found by him to be \$10,000.

"In an action upon a mortgage note to recover the balance due after a foreclosure sale where the mortgagors were not the owners of the equity at the time of the sale we think that it is open to the makers of the note to show, as bearing upon the amount due, that the sale was not conducted as it should have been, and that more should have been realized, especially if the holder of the mortgage was himself the purchaser." Morton, J., in Boutelle v. Carpenter, 182 Mass. 417, 419. And accordingly in that case it was held that it was competent for the trial judge under the circumstances therein disclosed to consider whether or not the sale was properly conducted. The property had been bought by the mortgagee for \$50, and it was agreed by the parties that, if it was competent for the judge to consider whether or not the sale had been properly conducted, the amount of \$800 instead of \$50 should be credited on the note. The trial judge considered the question and made the larger deduction, and his action was sustained. In that case the defendants were not notified of the proposed sale.

It is argued by the defendants that the present case is in substance the same as *Boutelle* v. *Carpenter*. It is to be noted that the defendant here did not ask for any specific ruling that if the sale was not properly conducted the full value of the property should be credited. They asked in substance for a ruling that as matter of law the court was bound to find that the foreclosure proceedings were not properly conducted.

The general finding was for the plaintiff and that finding is to stand if it be warranted in law upon any possible view of the evidence. There is no doubt that "the court will require entire good faith in a mortgagee acting under a power; but if he acts in such good faith, and fully conforms to the terms of his power, we cannot set aside a sale because it is a hardship upon the mortgagor. The hardship, if any, results from the contract of the

mortgagor, and we cannot relieve him from it without violating the rights of the mortgagee." Learned v. Geer, 139 Mass. 81, 82. Under the circumstances disclosed in that case it was said: "He [the mortgagee] had the power of adjourning the sale, but he was not obliged to do so, in the absence of any evidence that an adjournment would be of any benefit. He had the right to bid himself; and the facts that no other bidders were present, and that he purchased through an agent, do not make the sale invalid, nor does the fact that the estate brought less than its value as found by the master. Wing v. Hayford, 124 Mass. 249. King v. Bronson, 122 Mass. 122." If the mortgagors relied upon the allegations that the sale was not made in good faith or not properly conducted, the burden is upon them to show it. Wadsworth v. Glynn, 181 Mass. 220.

In the case before us there was a strict compliance with the terms of the power. The evidence further warranted the findings that the mortgagees gave notice to the mortgagers of the intended sale and acted in good faith. The judge was not bound to find as matter of law that an adjournment of the sale would have been for the benefit of the mortgagors. The hardship, it any there be, to the mortgagors arises from the nature of the contract and not from the method in which it was carried out. There was no error in refusing to give the ruling requested.

The defendants further urge that in no event could the sum of \$1,262.96 being the amount of taxes assessed upon the property before foreclosure and paid by the plaintiffs, be included in the sum due on the note. A short answer to this is that this question is not raised on the record. It was not specifically raised, and is not involved in the general ruling requested.

Exceptions overruled.

FRANK O. WHITE vs. WALTER S. HALE.

Suffolk. December 6, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Ruge, JJ.

Practice, Civil, Auditor's report.

The denial of a motion, to recommit an auditor's report with instructions to the auditor to set out in his report the facts and evidence on which he based his findings and rulings contrary to those requested by the party presenting the motion, is wholly within the discretion of the judge to whom the motion is addressed, and is not subject to exception or open to revision upon appeal.

In refusing to entertain an exception to the denial of a motion to recommit an auditor's report, this court called attention to the fact, that here, as in *Tobin* v. *Kells*, 207 Mass. 304, even if the court had had authority to review the exercise of discretion by the trial judge, there was nothing in the record to show what facts, if any, were agreed upon or proved at the hearing of the motion which was denied.

R. L. c. 165, § 55, makes an auditor's report prima facis evidence, but this leaves the party against whom his finding was made full opportunity to introduce at the trial evidence to disprove the correctness of such finding and also to raise any question of law on which he thinks that the ruling of the auditor was wrong.

CONTRACT by an attorney at law for \$3,500 for compensation for professional services alleged to have been rendered to the defendant on August 14 and 15, 1907. Writ dated August 16, 1907.

The answer, besides a general denial, admitted that the defendant employed the plaintiff to perform certain services for him on August 14 and 15, 1907, but alleged that such employment was an entire contract for an agreed price of \$25, which was paid fully in advance, and that the services required no special and peculiar skill and were not reasonably worth more than \$25.

The case was referred to Samuel K. Hamilton, Esquire, as auditor. He filed a report in which he found that a reasonable compensation for the services rendered by the plaintiff to the defendant was \$500, and that the plaintiff was entitled to receive that sum from the defendant.

The defendant filed a motion to recommit the auditor's report "and to instruct the auditor to correct the errors hereinafter re-

ferred to and to set out in his report the facts and evidence upon which he bases his findings and rulings contrary to the findings and rulings duly requested by the defendant," assigning the following grounds:

- "1. Because the auditor erred in finding that the services alleged to have been performed 'were rendered in consummating a sale of a contingent interest in the estate of E. M. J. Hale.'
- "2. Because the auditor erred in finding that the transaction concerning which the alleged services were rendered was 'to purchase of the beneficiaries all their interest in the real estate.'
- "3. Because the auditor erred in finding that 'the defendant discharged Mr. Poor as his attorney,' and has not limited his finding to the evidence that it was only in the matter of the negotiations with Frederick Ayer, and that Poor had been the family counsel for many years and had continued to act for the defendant in all other matters to and including the trial of this action.
- "4. Because the auditor erred in finding that the defendant in a very short time paid him (the plaintiff) a retainer of twenty-five dollars.'
- "5. Because the auditor refused to rule as duly requested by the defendant before the arguments were begun, as follows:
- (1) On all the evidence the finding must be for the defendant.
- (2) It is presumed that a payment is on account of services and not a retainer. (3) The evidence does not warrant a finding that the sum of \$25 was paid as a retainer. (4) The evidence does not warrant a finding that the payment of the sum of \$25 was a retainer, because at the time of said payment and the conversation relative thereto the parties had already entered into the relation of attorney and client and had commenced the work contemplated by the employment. (5) There is no evidence that there was such a cause pending at the time of the employment of the plaintiff and the payment of the sum of \$25 as to enable or authorize the plaintiff to receive and credit said sum as a retainer. (6) There was no such future service contemplated by the parties at the time of the employment of the plaintiff and the payment of the sum of \$25 as to enable or authorize the plaintiff to receive and credit said sum as a retainer."

The foregoing motion was heard by Richardson, J., who made

an order denying it. The defendant alleged exceptions, and also appealed from the order denying the motion.

Later the case came on for trial before Bond, J., without a jury. The defendant, before the introduction of any evidence, renewed his motion previously made to recommit the auditor's report for the reasons set forth in his motion and assigned as the grounds therefor. The judge denied the motion, and the defendant excepted.

The plaintiff then offered in evidence the auditor's report, which was objected to by the defendant on the ground that the report had not been recommitted in accordance with the defendant's motions theretofore filed. The judge admitted the report as evidence, and the defendant excepted.

The auditor's report, in which the auditor found and reported that the plaintiff was entitled to receive from the defendant the sum of \$500, was the only evidence offered. The judge found for the plaintiff in the sum of \$587.90; and the defendant alleged exceptions.

- E. S. Abbott, for the defendant.
- G. C. Abbott, for the plaintiff.

SHELDON, J. The motion to recommit the auditor's report was addressed wholly to the discretion of the justice before whom it was heard. This has been so recently decided that it is unnecessary to do more than refer to the case of *Tobin* v. *Kells*, 207 Mass. 304. The renewal of this motion before the judge who tried the case without a jury comes under the same rule. His action was not a subject of exception. And here, as in the case cited, we do not know what facts, if any, were agreed or proved at the hearing of either of these motions.

The auditor's report was prima facie evidence (R. L. c. 165, § 55), and justified the finding made at the trial. If the defendant thought that any of the findings of fact or rulings of law made by the auditor were wrong, he had full opportunity to put in evidence of the facts and raise the questions at law at the trial. See Fisher v. Doe, 204 Mass. 34.

Exceptions overruled and orders affirmed.

JOSEPH I. HUTCHINSON vs. HOWARD P. CONVERSE & another.

Middlesex. December 7, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Employer's liability, In tearing down building. Evidence, Presumptions and burden of proof, Uncontradicted.

At the trial of an action by a workman against his employer for personal injuries alleged to have been received because of negligence of a superintendent of the defendant while the plaintiff was in charge of a portable engine and was helping to tear down a building, there was evidence tending to show that in the work being done it was necessary to raise a certain truss weighing two tons by the use of a derrick operated by the engine that the plaintiff was in charge of, that immediately above the truss was an iron pipe or brace, which, if it contained so flaw, would resist a strain of twenty tons, that the superintendent either saw the iron pipe or should have seen it and nevertheless communicated to the plaintiff a signal to start his engine, that thereby the truss was raised and the pipe was broken and fell upon the plaintiff, and that the plaintiff was not aware of the danger incident to obeying the order of his superior and starting the engine. Held, that the questions, whether the superintendent was negligent and whether such negligence caused the injury to the plaintiff, were for the jury.

A jury are not bound to believe evidence merely because it is uncontradicted.

An employee, who is in charge of a portable engine, which operates a derrick, and is assisting in the tearing down of a building, does not as a matter of law assume the risk of negligence of a superintendent in directing him to start his engine when doing so will cause a truss to be raised in such a manner as to strike an iron brace and cause it to break and fall upon the employee.

If an employee, who is in charge of a portable engine, which operates a derrick, and is assisting in the tearing down of a building of a third person, is injured because his superintendent negligently directs him to start his engine and thus causes a truss to be raised against an iron brace, breaking the brace and causing it to fall upon the employee, his right of recovery against his employer is not affected by the fact that another cause of the breaking of the iron rod was a latent defect therein from crystallization or some other cause.

If an employee, who was in charge of a portable engine, which operated a derrick, and was assisting in the tearing down of a building of a third person, was injured because his superintendent negligently directed him to start the engine and caused a truss to be raised against an iron brace, breaking the brace and causing it to fall upon the employee, his right of recovery against his employer is not affected by the fact that he saw the iron brace above the truss and yet raised the truss so that it hit the brace, if it also might be found that, when he set his engine in motion to raise the truss exactly as he was directed to do by the superintendent, and while the engine was in motion, he could not tell how high the truss was going or whether it would hit the brace.

The mere fact that an employee knows or should know that, if he does an act which his superintendent directs him to do in the way in which he is directed to VOL. 208.

do it, he runs a risk of injury if the superintendent causes the work to be done in a negligent manner, is not fatal to his recovering from his employer in case he thereby is injured, because he has a right to expect the superintendent to use due care in managing the work.

TORT for personal injuries received by the plaintiff while employed by the defendants in the tearing down of a building at the United States Arsenal at Watertown, the plaintiff being in charge of a portable engine. Writ dated July 10, 1908.

The declaration was in three counts, but the case was submitted to the jury on the second count only, which alleged as the cause of the plaintiff's injuries negligence of a superintendent of the defendants.

The case was tried before *Bell*, J. The facts are stated in the opinion. At the close of the evidence the defendant asked the judge to give the following rulings:

- "1. Upon all the evidence in the case the plaintiff is not entitled to recover.
- "2. There is no evidence of negligence as to the way in which the loose end of the pipe or stack brace was left at the time the signal to hoist was given.
- "3. Even if any such negligence has been shown the plaintiff knew the fact and the obvious danger if there was any and assumed the risk.
- "4. The removal of heavy trusses like these in question is always attended with risk and danger to those employed in and about the work of such removal, and the danger was as obvious to plaintiff as to any one else on the ground.
- "5. If the accident was due primarily to the breaking of the iron rod which connected the two main chords of the truss, and that break was due to a latent defect in the iron from crystallization or from some other cause, the plaintiff cannot recover.
- "6. If the accident was due primarily to the breaking of the iron brace or pipe connecting smokestack and roof, and that break was due to a latent defect in the iron from flaws or some other imperfection therein, the plaintiff cannot recover.
- "7. If Hutchinson saw the brace above the truss or resting on the truss, and raised the truss so that it hit the brace, he assumed the risk of the breaking of the brace. The plaintiff assumed the risk of the breaking of the brace. If plaintiff knew or should

have known of the danger of the breaking of the brace, he cannot recover."

The judge refused to give any of these rulings. The jury found for the plaintiff in the sum of \$495; and the defendants alleged exceptions.

W. B. Farr, for the defendants.

H. C. Long, for the plaintiff.

SHELDON, J. The defendants' first, second and third requests for instructions were rightly refused. The jury could find that the iron pipe or brace which broke was either resting upon the truss that was to be moved, or passed over the truss at some little distance above it; that the defendants' superintendent saw this or ought to have seen it, but negligently caused the truss to be raised up against the brace so that the latter broke and fell, and thus caused the injury to the plaintiff. They also could find that the plaintiff was not aware of this danger and did not assume the risk which it caused; that he was doing the work which he was employed to do, following exactly the directions which he received, and was exercising due care. This is enough. The jury were not bound to believe the testimony put in by the defendants, although this was uncontradicted. Lindenbaum v. New York, New Haven, & Hartford Railroad, 197 Mass. 814, 323. Even if the truss weighed only two tons or less and the iron pipe or brace but for a concealed flaw would have resisted a steady strain of approximately twenty tons, the jury could find that the shock caused by the momentum of the moving truss exceeded this strain, in accordance with a well known law of mechanics, and that the superintendent should have foreseen this danger and guarded against it, or at least have warned the plaintiff of what was liable to happen.

The fourth request should not have been given. The plaintiff did not assume the risk of the superintendent's negligence in causing the truss to be raised up in such a manner as to strike against the brace running from the smokestack. Davis v. New York, New Haven, & Hartford Railroad, 159 Mass. 532, 536. It was for the jury, not the court, to say whether the danger was as obvious to the plaintiff as to any one else on the ground.

The fifth request could not have been given as framed. The

jury could find that the breaking of the iron rod was itself due to the violent shock or impact of the truss upon the pipe or brace running from the smokestack, and that this shock was due to the superintendent's negligence. In that event, the direct cause of the whole accident was negligence for which the defendants were liable. But this contingency was not covered by the request.

Exactly the same reasoning applies to the sixth request. That too was rightly refused.

It does not follow, in the words of the seventh request, that if the plaintiff saw the brace or iron pipe above the truss or resting thereon, and raised the truss so that it hit the brace, he assumed the risk of its breaking. It could be found that he set his engine in motion and thus raised the truss exactly as he was directed to do by the superintendent through the tagman, and that while so doing he could not tell how high the truss was going or whether it would hit the brace. Nor would the fact, that he knew or should have known that there would be danger of the breaking of the brace if the superintendent caused the truss to be raised in a negligent manner, be fatal to a recovery. He had a right to expect the superintendent to use due care in managing the work. The seventh request was rightly refused.

There is no complaint but that full and accurate instructions were given to the jury.

Exceptions overruled.

SULLIVAN NILES US. HENRY S. ADAMS.

Suffolk. December 7, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Contract, What constitutes. Evidence, Admissions, Presumptions and burden of proof.
Words, "Charged."

In an action of contract upon an account annexed for goods sold and delivered to a third person upon an alleged original promise of the defendant to pay for them, there was evidence that, before the goods were delivered, the defendant had sent to the plaintiff a letter in which he had stated that any such goods delivered after a date then two months past should be charged to him personally, that

after receiving the letter the plaintiff had delivered the goods in question and had sent bills to the defendant which did not have on them the name of the defendant, but only the names of the third person and of the plaintiff, that the defendant had paid some of the bills and had stated to the plaintiff that, if he had sent the plaintiff the letter above referred to, he "supposed he would have to pay the bill." On the plaintiff's book of original entry the goods stood charged to the third person. Held, that the facts that the charges purported to be made to the third person and that his name appeared on the bills were not decisive that credit was not given to the defendant, and therefore that the question of the liability of the defendant was for the jury.

A statement in a letter to a tradesman that certain goods to be furnished by the tradesman to a third person should be "charged" to the writer of the letter is equivalent to a promise by the writer of the letter to pay the tradesman for goods so furnished.

The conduct of a tradesman, in putting charges for goods, furnished to a third person on the original promise of another to pay for them, on his books under the name of the third person, is merely an admission on the part of the tradesman to be considered with other evidence on the subject, including explanations by the tradesman of his reason for doing so; and therefore, in an action by the tradesman against the promisor, the judge need not charge the jury that such conduct is prima facie evidence against the plaintiff that he gave credit to the third person and not to the defendant.

CONTRACT upon an account annexed for milk and eggs which the plaintiff contended he furnished to one Esther A. Squire from January 2, 1905, to May 9, 1906, upon the credit of the defendant. Writ in the Municipal Court of the City of Boston dated October 16, 1907.

On appeal to the Superior Court, the case was tried before *Hitchcock*, J. The delivery of the goods was not questioned and there was no contention that the bill was paid.

There was evidence that for some time previous to May 6, 1904, the plaintiff had furnished milk and eggs to Miss Squire and had rendered statements of account bearing her name which were paid by one Fred Squire, excepting one for goods furnished during the three months previous to April 1, 1904, which on June 13, 1904, was paid by a check signed by the defendant as "conservator of the property of Esther A. Squire"; that on May 6, 1904, the plaintiff received a letter, signed, "H. S. Adams, Conservator," and reading as follows: "In regard to bills which you have sent to Miss Squire for milk, I would say that doubtless you are aware that the financial affairs of Miss Squire are somewhat involved. Ever since I have been appointed conservator I have been endeavoring to straighten them

out, but have not succeeded in doing so yet. I shall pay your bill as soon as I can raise money for the payment of her bills. Any milk and eggs delivered since March 1st, should be charged to me personally, as I have taken the expense of caring for the house upon my own shoulders, so as to relieve her estate of that burden."

In his book of original entry the plaintiff kept the account under the name of Miss Squire, and all bills which he sent, excepting three, were headed, "Miss Squire to Sullivan Niles, Dr." Of the three exceptions, one was dated October 1, 1905, and was headed "Miss Squire — H. S. Adams," one December 1, 1905, and headed "Mrs. Lockwood Estate," and one May 12, 1906, and headed "H. S. Adams." All bills after May 6, 1904, were sent to the defendant. The plaintiff testified that after receiving the defendant's letter of May 6, 1904, he did not consider that it made any difference as to just how the bills were headed or in whose name they were made out so long as he sent them to the defendant.

The defendant admitted that he stated to the plaintiff that, if he had sent the plaintiff the letter of May 6, 1904, "he supposed he would have to pay the bill."

At the close of the evidence the defendant asked for the following rulings:

- "(1) That, upon all the evidence, the plaintiff is not entitled to recover.
- "(2) That there is not sufficient evidence to go to the jury that the defendant ever promised the plaintiff to pay for milk and eggs delivered after January 1, 1905.
- "(3) If the plaintiff charged to Miss Squire on his books the milk and eggs in suit or presented bills therefor in the name of Miss Squire, that is *prima facie* evidence against the plaintiff that he gave the credit to Miss Squire and not to the defendant."

The presiding judge refused the rulings, and on the subject matter of the last request charged the jury as follows:

"It is not conclusive upon the liability of the defendant that the goods were charged to Miss Squire. It is not conclusive. It is a piece of evidence to be considered by you in the way in which it is offered. It is presented as something in the nature of a demand by the plaintiff that he understood that the indebtedness was an indebtedness of Miss Squire, and that he was sending the bills to the defendant at his request. The evidence is before you, and evidence bearing upon the question of what the plaintiff understood with reference to the party to whom the credit was to be given.

"And the same thing is true in regard to the form in which the bills were made out, and as they were sent to the defendant. They are not conclusive in any way, but if they are admissions, why, they are to be taken for what they are worth as admissions on the part of the plaintiff. If they have any weight in determining the question of the liability of the defendant upon the contract, why, they are to be given such weight as you think they are entitled to have."

The jury found for the plaintiff in the full amount claimed; and the defendant alleged exceptions.

The case was submitted on briefs.

- J. P. Wright & W. E. Tucker, for the defendant.
- C. L. Allen & H. P. Herr, for the plaintiff.

SHELDON, J. The defendant's first request for instructions could not have been given. There was evidence that on May 6, 1904, he promised in effect to pay for the milk and eggs to be furnished by the plaintiff to Miss Squire; that the plaintiff furnished such supplies on the faith of that promise, and communicated this fact to the defendant by sending to him bills for the amount furnished from time to time, some of which bills the defendant paid. The fact that the charges purported to be made to Miss Squire and that her name appeared on the bills was not decisive that credit was not given to the defendant, or that the goods were not charged to him in the sense that he was expected to pay for them. James v. Spaulding, 4 Gray, 451. Holmes v. Hunt, 122 Mass. 505. Pettey v. Benoit, 193 Mass. 233.

The jury could find that the plaintiff had accepted the defendant's offer to pay for these supplies and had brought notice of his acceptance home to the defendant. Springfield v. Harris, 107 Mass. 532, 540.

For like reasons, the second request was properly refused. A distinction cannot be drawn between a request to charge goods to one personally and a direct promise to pay for them.

If any question as to the defendant's liability remained in

doubt, the jury could find that the doubt was removed by the defendant's admission that he supposed he would have to pay the bill if he had written the letter relied on by the plaintiff.

The last request, so far as it was correct, was given in substance. Taken at its strongest, the conduct of the plaintiff in putting his charges under the name of Miss Squire and in making his bills run in her name was merely an admission on his part, open to explanation, and that is the way the judge put it to the jury. He was not bound to say that a particular piece of evidence was "prima facie evidence" for or against either party. That might have misled the jury. This point was sufficiently and accurately covered in the charge.

Exceptions overruled.

Helen T. McDermott vs. Boston Elevated Railway Company.

Norfolk. December 8, 1910. - March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence. Street Railway.

If after a street car has come to a full stop the conductor makes way for a woman passenger to get out and she starts to do so, but while she is stepping from the car it starts suddenly and she is thrown to the ground and is injured, these facts are evidence of due care on the part of the passenger and of negligence on the part of either the conductor or the motorman of the car.

TORT for personal injuries alleged to have been sustained by the plaintiff on March 16, 1909, by reason of the sudden starting of a box car of the defendant, on which the plaintiff was a passenger, while she was in the act of alighting from it. Writ dated April 16, 1909.

In the Superior Court the case was tried before *Morton*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant on the ground that there was no evidence of negligence on the part of the defendant. The plaintiff alleged exceptions.

- C. F. Rowley, for the plaintiff.
- L. E. Flye, for the defendant.

SHELDON, J. The jury could have found that the car had stopped for the apparent purpose of allowing passengers to alight; that while the car had been approaching the transfer station which was a regular stopping place, the plaintiff had risen from her seat and come to the door in order to be ready to step out as soon as the car should have stopped; that, as she was about to step into the vestibule of the car, the conductor barred her passage by putting his arm across the door and his hand upon it, and so holding it until the car had come to a complete stop; that the conductor then removed his hand and stepped back, thus making way for her to get out, which she accordingly started to do; but that while she was stepping down, the car started and so threw her to the ground. This was enough to justify the jury in finding that she was in the exercise of due care, having been invited by the conductor to go out of the car, and that either the conductor or the motorman was negligent in starting the car while she was in the act of leaving it. Worthen v. Grand Trunk Railway, 125 Mass. 99. Barden v. Boston, Clinton & Fitchburg Railroad, 121 Mass. 426. Boston & Maine Railroad, 168 Mass. 152, 155. McGlinchy v. Boston Elevated Railway, 206 Mass. 7. Black v. Boston Elevated Railway, 206 Mass. 80. The case is not at all like O'Neil v. Lynn & Boston Railroad, 180 Mass. 576, or Curtin v. Boston Elevated Railway, 194 Mass. 260, relied on by the defendant. This accident was not caused by any jerk of the car in starting or stopping, but by making a sudden start after the car had come to a full stop for passengers to alight, and while the plaintiff was in the act of alighting. See Work v. Boston Elevated Railway, 207 Mass. 447.

Exceptions sustained.

MICHAEL J. ROONEY vs. BOSTON AND MAINE RAILBOAD. SAME vs. RICHARD S. LOMBARD.

Suffolk. December 9, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Employer's liability, Invited person, In freight house. Railroad.

A dealer in hay, who sends a teamster in his employ to a freight house of a railroad corporation for bales of hay, owes no duty to such teamster previously to inspect the piles of bales of hay in the freight house to ascertain whether they are piled carefully so as not to fall on the teamster when he is passing a pile.

In an action by a teamster in the employ of a dealer in hay against a railroad corporation, for personal injuries sustained when the plaintiff had been sent by his employer to a freight house of the defendant for nine bales of hay and, after he had put two bales on his team and was rolling out the third, a bale of hay fell upon him from a pile of bales as he was passing it, where there is evidence tending to show that the manner in which the bales were piled was improper and dangerous and rendered them likely to fall, so that the question of the defendant's negligence is for the jury, the questions, whether the plaintiff in the exercise of due care should have observed the manner in which the hay was piled and whether the way in which he took out the three bales was a proper one and, if it was not, whether it contributed to the accident, also are for the jury.

Two actions of tort by the same plaintiff, in the first case against the Boston and Maine Railroad, and in the second case against Richard S. Lombard, a dealer in hay and grain, for injuries sustained by the plaintiff on December 29, 1906, when, in the course of his duty as a teamster in the employ of the defendant in the second case, he had been sent to get nine bales of hay from a freight house of the defendant in the first case in that part of Boston called Charlestown, and, after he had put two bales of hay on his team and was rolling out the third bale, a bale of hay fell upon him from a pile of bales as he was passing it. Writs dated March 15, 1907.

The declaration in the first case alleged negligence of the defendant in neglecting its duty to manage and control the storage of the hay in a safe manner in respect to the plaintiff and in neglecting its duty to keep and maintain the piled hay in a safe condition in respect to the plaintiff. The declaration in the second case alleged that the plaintiff's injuries were caused by

the negligence of the defendant in setting the plaintiff at work in a dangerous place without due warning and instruction, and by the negligence of the defendant in failing to furnish and maintain for the plaintiff proper and safe appliances, ways, works, means and instruments, or to furnish and maintain for him a safe place in which to work.

In the Superior Court the two cases were tried together before Dana, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant in each of the cases, with the agreement of the parties which is stated in the opinion. The plaintiff alleged exceptions, incorporating this agreement.

The case was submitted on briefs.

- D. H. Coakley, R. H. Sherman & W. Flaherty, for the plaintiff.
- A. R. Tisdale, for the Boston and Maine Railroad.
- G. C. Dickson & C. S. Knowles, for the defendant Lombard.

MORTON, J. These two actions, which grew out of one and the same injury, were tried together. In each case the judge, subject to the plaintiff's exceptions, directed a verdict for the defendant, the parties agreeing that if the ruling was right judgment should be entered on the verdict, but, if wrong, that judgment should be entered for the plaintiff against one or both defendants in the sum of \$500. We think that the ruling directing a verdict for the defendant Lombard was right, but that directing a verdict for the railroad company was wrong.

There was no evidence tending to show that Lombard had anything to do with the piling of the bales, one of which fell and injured the plaintiff. The bales were in a freight shed belonging to the railroad company, and it could have been found that they were piled in the shed by and under the direction of its servants and agents, as they were unloaded from the cars on their arrival. The shed did not constitute a part of the defendant Lombard's ways, works and machinery. He had nothing to do with it except to go there or send some one there to get the hay upon receiving from the railroad company notice of its arrival. Neither he nor his foreman owed to the plaintiff any duty to inspect the place where the hay was stored. Dunn v. Boston & Northern Street Railway, 189 Mass. 62. They had a

right to assume that the place was a safe place and that the hay had been stored in a proper manner. It would be imposing too great a burden on the master to require that where the servant was sent to another place on his master's business the master should go with him or send some one with him to inspect the premises to see if they were safe. See *Eisner* v. *Horton*, 200 Mass. 507.

If any duty of inspection rested upon any one it would seem to have been upon the plaintiff himself. And whether in the exercise of due care he should have observed the manner in which the hay was piled was plainly a question for the jury, as was also the question whether the way in which he took out the bales was a proper one, and if it was not, whether it contributed to the accident.

There was evidence tending to show that the manner in which the bales were piled was improper and dangerous, and rendered them more liable to fall, and that that was the proximate cause of the plaintiff's injury.

The result is that we think that judgment for \$500 for the plaintiff should be entered against the railroad company, and that judgment should be entered on the verdict for the defendant Lombard.

So ordered.

GEORGE H. TWISS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 9, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Street railway, Licensee, Due care of plaintiff. Street Railway. Carrier, Of passengers. Corporation, Officers and agents. Waiver.

If a member of the fire department of a city, who is being transported free on an open electric car of a corporation operating a street railway, is injured by a collision while he is standing on the left hand running board of the car outside the side bar, which is lowered, having taken his place there knowing of a rule of the corporation that members of the fire department shall be transported free on open cars only on the rear platforms, and knowing also of another rule of the corporation that when the side bar of an open car is in use on the left hand side no person shall be allowed to stand on the left hand running board,

he is at most a licensee, to whom the corporation owes no duty except to refrain from injuring him intentionally or wantonly.

- It seems that, if a person, who is being transported as a passenger on an open electric car of a corporation operating a street railway, stands on the left hand running board of the car outside the side bar, which is lowered, knowing of a rule of the corporation, that when the side bar of an open car is in use on the left hand side no person shall be allowed to stand on the left hand running board, and is injured by a collision which would not have hurt him if he had not been standing on the left hand running board, he cannot recover from the corporation on showing that the accident was due to the negligence of the servants of the corporation, because his violation of the rule must be regarded as a negligent act which contributed directly to the injury which he received.
- It seems that, if the conductor of an open electric car of a corporation operating a street railway sees a member of the fire department in his uniform getting upon the left hand running board of the car outside the side bar, which is lowered, both of them knowing of a rule of the corporation that members of the fire department shall be transported free on open cars only on the rear platforms, and both of them also knowing of another rule of the corporation that when the side bar of an open car is in use on the left hand side no person shall be allowed to stand on the left hand running board, and under these circumstances the conductor nods to the member of the fire department as he gets upon the car, it does not matter whether the nod of the conductor was intended merely as a sign of recognition or whether it was intended as an acquiescence in the member of the fire department taking his position on the left hand running board, because it is not in the power of a conductor of a corporation operating a street railway to waive such rules of the corporation.
- MORTON, J. This is an action of tort for personal injuries received by the plaintiff at or near the corner of Hampden and Northampton Streets in Boston, while riding on one of the defendant's open cars. The accident occurred July 81, 1907, at about 11.80 A.M. The plaintiff was a lieutenant in the Boston Fire Department, and was returning to his station on Northampton Street when the accident happened. He was in uniform and boarded the car about an eighth of a mile from the scene of the accident. When he got on to the car he took a position on the left hand running board outside the side bar, which was down and properly adjusted, and he remained in that position until the accident. Certain rules of the defendant company were introduced in evidence as follows:
 - "48. Side Bar and Chains.
- "(a) Side bars on all cars so equipped must, when in service, be properly adjusted and secured in place, and must be raised and lowered at places en route when required by special regulations; never while car is in motion."
 - "(d) Passengers must not be permitted to board and leave

the car by getting over or under the bar, and when bar is in use on left side, no person must be allowed to ride on left hand running board."

- "118. Free Riders. The following persons, when in full uniform and wearing official badge, are entitled, under special considerations and restriction, to free transportation on cars of the company."
- "(b) Firemen. Members of the Fire Department and Protective Fire Department."
- "(e) The above specified shall ride only on the front platform of box and rear platform of open cars, and not more than two of either class at any one time."

The plaintiff testified that he knew of these rules and knew that the bar was down on the left hand side for the purpose of preventing persons from entering or leaving the car by the left hand side. He further testified that the car was comfortably filled; that he did not pay or tender any fare, but intended to ride free; that some persons were standing on the back platform, and that he had ridden on the left hand running board of other cars in the same vicinity at about the same time of day before, and had seen other firemen doing the same. On crossexamination he testified that "he had never received any permission from any superintendent, inspector or other officer to ride on the left hand side when the bar was down and knew of no order or rule changing the aforesaid two rules." There was other evidence tending to show the circumstances under which the collision took place; that the conductor nodded to the plaintiff as he got on to the car; that there was no one on the right hand running board; that there were some spare seats; and that the plaintiff was the only one on the left hand running board and the only one who was injured. At the close of the evidence the judge * ordered a verdict for the defendant and reported the case to this court; judgment to be entered for the defendant if the ruling was correct, otherwise, by agreement of parties, for the plaintiff in the sum of \$500.

The defendant concedes that there was evidence of negligence on its part, but contends that it is not liable to the plaintiff, and we think that it is right in so contending. The fact that a per-

[·] Brown, J.

son is injured through the negligence of the company while riding upon the running board of a car is not of itself conclusive under any and all circumstances against his right to recover. Olund v. Worcester Consolidated Street Railway, 206 Mass. 544. But in the present case the plaintiff was being transported free under a rule which required as a condition of such transportation that he should ride on the rear platform. Instead of doing that he rode upon the left hand running board with the bar down, in direct violation of a rule which he well knew and understood, and which was a reasonable rule, that provided that no one should be allowed to ride there when the bar was down. While he would have been a passenger with the rights of one if riding upon the rear platform (Dickinson v. West End Street Railway, 177 Mass. 865), we think that he must be regarded under the circumstances as at most a licensee to whom the defendant owed no duty except to refrain from intentional wrongdoing towards him. See Bowler v. Pacific Mills, 200 Mass. 864.

Even if the plaintiff could be regarded as a passenger we think that his act in taking a position on the left hand running board in violation of the rule would have to be regarded under the circumstances as a negligent act which contributed directly to the injury which he received. Moody v. Springfield Street Railway, 182 Mass. 158. Whether the nod given by the conductor was intended merely as a sign of recognition or whether it was intended as an acquiescence in the plaintiff's taking his position on the running board is immaterial. If it was intended as the latter it was not in the power of the conductor to waive the rules, and the evidence fell far short of showing a custom on the part of firemen to ride on the running board so general and so long continued that it could be found that it was known to the officers having the right to make or change the rules. Powers v. Boston & Maine Railroad, 153 Mass. 188. Crowley v. Fitchburg & Leominster Street Railway, 185 Mass. 279. result is that in accordance with the terms of the report judgment must be entered for the defendant.

So ordered.

The case was submitted on briefs.

D. H. Coakley, R. H. Sherman & W. Flaherty, for the plaintiff.

F. Ranney & E. B. Horn, for the defendant.

ALEXANDER I. PECKHAM vs. JOHNSON W. RAMSEY, administrator.

Suffolk. December 9, 1910. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Attorney at Law.

There is no inconsistency or impropriety in an attorney at law, with the knowledge and consent of all persons interested, acting for a plaintiff in procuring a judgment for damages for personal injuries against a certain defendant, and, after that defendant's death, acting for the administrator of his estate in prosecuting successfully a suit in equity to obtain possession of certain property and money belonging to his estate, a part of which thereupon is applied to settling the judgment obtained against the intestate in the action for personal injuries, the attorney receiving the payment in behalf of his client in that case.

CONTRACT for the sum of \$100 and interest as compensation for professional services as an attorney at law alleged to have been rendered to the defendant as administrator of the estate of William G. Russell, late of Boston, who had been a hotel proprietor and real estate dealer. Writ in the Municipal Court of the City of Boston dated January 15, 1909.

On appeal to the Superior Court the case was tried before Fox, J. It appeared that in the year 1908, during the lifetime of William G. Russell, the plaintiff brought two actions against Russell in behalf of one Catherine L. Walker, the administratrix of the estate of Elizabeth M. Walker, late of Boston, in the Superior Court for personal injuries alleged to have been received by Elizabeth M. Walker during her lifetime.

Pending this litigation, but after the plaintiff had prosecuted the actions to verdicts in favor of Catherine L. Walker, Russell died intestate, and the defendant was appointed the administrator of his estate, and thereafter appeared and assumed the defense of the two suits. The plaintiff appeared in the Probate Court as attorney for Catherine L. Walker, who filed a petition in that court, representing herself to be a creditor of the estate of Russell and praying that the defendant should be required to give a new bond with different sureties and in a larger sum than that fixed by the Probate Court, and the defendant agreed to

give a new bond with new sureties. This was not done, as a settlement was effected between the defendant and the plaintiff, acting for Catherine L. Walker.

It appeared that a bill in equity was brought by the defendant in the Superior Court to get possession of property for the Russell estate, the plaintiff appearing as counsel of record for the present defendant. As a result of this bill in equity an agreement under seal was entered into between the defendant as administrator of the estate of William G. Russell, William H. Russell, the only heir of William G. Russell, deceased, and Catherine L. Walker, administratrix as aforesaid, by which, upon the payment of a sum of money to the plaintiff smaller than the amount of the two verdicts, the exceptions in the two actions would be waived and a judgment entered for the plaintiff Walker.

In making this agreement and by the terms of the agreement, the plaintiff acted as the attorney of Catherine L. Walker, and the money to be paid under the agreement was to be by the terms of the agreement, and was in fact, paid to the plaintiff as the attorney of Catherine L. Walker.

In consequence of the suit in equity, certain property and money came into the hands of the defendant as administrator of the estate, a part of which was applied to the payment of the judgments in accordance with the terms of the agreement.

The plaintiff, before the bringing of the bill in equity and pending the proceedings incident to the recovery of the money and property, furnished valuable information and assistance to the present defendant, both in the drawing of the bill and in the investigation incident thereto and to said proceedings. He also rendered services to the defendant as administrator after the agreement in settlement was signed, but before the terms thereof had been fulfilled and the payments provided thereby had been made, in a proceeding in the Probate Court described in one item of the declaration.

The foregoing constituted the services for the recovery of which this action was brought.

There was evidence from which the jury might have inferred that the services were rendered at the request of the defendant and that the defendant agreed to pay the plaintiff for them.

The plaintiff introduced evidence, subject to the defendant's Vol. 208.

objection and exception, that Catherine L. Walker was informed by the plaintiff of the fact that he had been requested by the defendant to perform the services mentioned in the declaration, and that before undertaking the performance of these services, she (Walker) was told by the plaintiff of the request made by the defendant, and that he would charge the defendant and not charge her for such services, if undertaken, that she assented to such arrangement, and that he then performed the services and did charge the defendant and did not charge her. The facts above set forth were substantially all the facts necessary to the determination of the questions raised by the defendant at the trial and in the bill of exceptions and were the substance of all the evidence introduced at the trial.

At the conclusion of the evidence, the defendant asked the judge to give the following instructions to the jury:

- 1. Upon all the evidence, the verdict should be for the defendant.
- 2. If the jury find that at the time the plaintiff performed the alleged services set forth in his declaration, or any part of them, he was acting as attorney for any other person, he cannot recover from the defendant.
- 4. The fact that the plaintiff appeared as counsel for a creditor in the Probate Court, in reference to the administration of the Russell estate, precludes him from being counsel for the Russell estate during the time that he is acting as counsel of a creditor aforesaid.
- 5. The contract alleged to have been [made] between the defendant and the plaintiff would be void as against public policy.
- 6. If the jury find that an agreement was in fact entered into between the defendant and the plaintiff, whereby the plaintiff was to render the services set forth in his declaration, then such an agreement would be void as against public policy.

The judge refused to give any of these instructions, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$113.45. The defendant alleged exceptions to the refusals of the judge to give the instructions requested by him and to a portion of the charge "wherein the jury were instructed that it was proper for the plaintiff to render services, render the services in question, and also that portion of the

charge wherein the jury were instructed that there was no, in substance, there was no inconsistency in the position of the plaintiff as attorney for the Walker estate in rendering the services in question to the Russell estate."

- S. R. Cutler, for the defendant.
- A. I. Peckham, pro se, was not called upon.

SHELDON, J. The instructions requested by the defendant were rightly refused, and those that were given to the jury were full and accurate. The services recovered for were rendered by the plaintiff to the defendant and charged for accordingly with the full knowledge and consent of both the defendant and Miss Walker. There was nothing inconsistent in the duties which he then owed to the several parties. It was perfectly proper for the plaintiff to seek to obtain for the defendant money to which the latter was entitled, that he might use it in settling with Miss Walker and otherwise, as he should see fit. The plaintiff was not acting for both parties in any matter which was in dispute between them.

The evidence introduced by the plaintiff under the exception of the defendant was competent and material to show that it was understood and agreed to by all parties that the services now in question were rendered to the defendant and to be paid for by him. Walker v. Osgood, 98 Mass. 848, 352. Burr v. Beacon Trust Co. 188 Mass. 131, 133. Rupp v. Sampson, 16 Gray 398.

Exceptions overruled with double costs.

CARRIE WHITNEY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 2, 1911. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Street railway, Res ipea loquitur. Evidence, Presumptions and burden of proof.

At the trial of an action against a corporation operating a street railway, for personal injuries caused by the side bar of an open electric car of the defendant, in which the plaintiff was a passenger, falling upon the plaintiff's shoulder, it

appeared that at the time of the accident the plaintiff was sitting at the left hand end of the front seat of the car, and that, as the car was leaving a subway to go out upon a surface track, the bar dropped and struck the plaintiff's shoulder. There was no question but that the plaintiff was in the exercise of due care. The plaintiff was the only witness on his side, and testified that he did not see the conductor or the motorman lower the bar or see any one else near it until he was struck by it. It appeared that it was the duty of the conductor and the motorman to lower the bar on the left hand side on every trip at about the place where the plaintiff said that the car was when the bar fell. The conductor and the motorman both testified for the defendant and disclaimed any knowledge of such an accident or such an occasion as the plaintiff described. Held, that there was no adequate explanation of the falling of the bar except through the act or neglect of the conductor or the motorman, or both, in causing or permitting it to fall, and that negligence on their part was a legitimate inference from the happening of the accident as described in the plaintiff's testimony, and would justify a finding that the defendant was liable.

TORT for personal injuries alleged to have been sustained by the plaintiff on August 10, 1909, by reason of the negligence of the defendant's servants in letting fall upon the plaintiff a side bar of an open car of the defendant in which the plaintiff was a passenger. Writ in the Municipal Court of the City of Boston, dated September 3, 1909.

On appeal to the Superior Court the case was tried before *Morton*, J., without a jury. At the close of the evidence, which is described in the opinion, the defendant asked the judge to rule that upon the evidence and the pleadings as matter of law the plaintiff was not entitled to a finding. The judge refused to make this ruling, and found for the plaintiff, assessing damages in the sum of \$300. The defendant alleged exceptions.

The case was submitted on briefs.

- J. E. Hannigan, for the defendant.
- J. J. Scott, for the plaintiff.

Knowlton, C. J. The only question in this case is whether the evidence warranted a finding for the plaintiff. She testified that she was a passenger on one of the defendant's open cars, in the front seat at the left hand side of the car, and that, as the car was leaving the subway going southward and was going out near Pleasant Street, the bar on that side of the car, which had been up, was dropped down so that it struck her on her shoulder and injured her. There is no doubt, upon her testimony, that she was in the exercise of due care.

The defendant contends that her case was not made out, be-

cause she was the only witness on her side, and she testified that he did not see the conductor or motorman lower the bar, or see anybody else near it before she was struck by it. She was the only passenger. The conductor and motorman both testified, and although they disclaimed any knowledge of such an accident or occasion as the plaintiff described, it appeared that it was their duty to lower the bar on the left hand side of the car on every trip, at or about the place where the plaintiff said the car was when the bar struck her. There was no adequate explanation of its falling, except through the act or neglect of the conductor or motorman, or both, in permitting it to fall. were in charge of it and it was their duty to lower it by a joint The fact that the plaintiff did not observe the conditions or see either of them do anything before she was struck does not prevent a legitimate inference from her testimony that the fall of the bar was produced by their agency, and that their conduct was negligent.

Exceptions overruled.

James T. Heshion vs. Boston Elevated Railway Company.

Suffolk. January 3, 1911. — March 1, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Street railway.

If one, who had been employed by a street railway company as a conductor for three years, becomes a passenger upon an open electric street car of the same company, takes his position upon the running board and, as the car passes through a very busy city street with which he is entirely familiar and in which there is a space of but eight feet and two inches from the running board to the curbstone, stands holding to the uprights of the car, facing the car's interior and not looking out to see whether he is in danger of coming into contact with teams or obstructions in the street, and is struck by the pole of a cart which he easily could have seen had he looked in the direction in which the car was going, and could have avoided by temporarily stepping into the car between the seats or drawing himself farther into the car, he cannot be said to have been in the exercise of due care, since, with a knowledge of the dangers attending his position, he disregarded them.

TORT for personal injuries received while the plaintiff was on the running board of an open car of the defendant, and due to his being struck by the pole of a cart on Cambridge Street in Boston. Writ dated July 18, 1907.

In the Superior Court the case was tried before Sherman, J.

The facts are stated in the opinion. At the close of the evidence the presiding judge ordered a verdict for the defendant and reported the case for determination by this court, judgment to be entered on the verdict if his ruling was correct; otherwise, a new trial to be granted.

The case was submitted on briefs.

- J. J. Scott, for the plaintiff.
- J. E. Hannigan, for the defendant.

SHELDON, J. If we assume that there was evidence of negligence of the defendant's servants in driving their car past the projecting pole of the cart, we come to the question whether there was evidence of the plaintiff's due care.

In the absence of any special circumstances, such as a regulation of the railway company properly published or brought to the knowledge of the passenger (Cutts v. Boston Elevated Railway, 202 Mass. 450), or the existence of known or probable dangers calling for special care to avoid them, it is for the jury to determine the negligence or due care of a passenger who is riding upon a more exposed part of a street railway car, such as the front or rear platform or the running board of an open car. Beal v. Lowell & Dracut Street Railway, 157 Mass. 444. Sweetland v. Lynn & Boston Railroad, 177 Mass. 574. Pomeroy v. Boston & Northern Street Railway, 193 Mass. 507. Eldredge v. Boston Elevated Railway, 203 Mass. 582.

The last two cited cases have carried the rule farthest in favor of the plaintiffs. In the Pomeroy case, the plaintiff, while on the running board of an open car, was injured by coming in contact with a trolley pole which the defendant maintained near a curve in its track inclining towards the track at such an angle as to involve the danger of its hitting any one upon the running board of a passing car. He was familiar with the place and knew generally the location of the trolley poles, although he was not aware that any one of them was so placed as to create the danger which was found to exist. He was not paying atten-

tion to anything which might be on that side of the track. It was held that these facts, although important evidence upon the issue of his due care, were not conclusive against him.

In the Eldredge case, it was held that such a passenger cannot disregard the ordinary incidents of travel from the concurrent use of the streets by other travellers, but he has the right to assume that the carrier will not expose him to injury from passing vehicles, if by the exercise of reasonable diligence the movements of the car can be so controlled as to avoid the risk of collision; and the fact that though looking forward he does not observe a vehicle ahead of the car and dangerously near to it, and so is injured by the hub of its wheel striking against him, will not necessarily preclude a finding that he was in the exercise of due care.

In the case at bar the plaintiff had been employed by the defendant as a conductor for three years. He was entirely familiar with this street. It was, as he knew, a narrow street. At this point, the distance from the curbstone to the track was nine feet and eight inches, and the car overhung the track on each side a space of eighteen inches, so that there were only eight feet and two inches between the edge of the running board and the curbstone. This was a very busy street. Plainly it was neither strange nor unlikely that a cart either loading or unloading should be standing with its pole extending out into the street. Plainly also a proper care for his own safety required the plaintiff in going through so narrow a space in his exposed position to take some degree of care for his own safety against the near approach of other vehicles or even a brushing by them against the running board upon which he was standing. While he had the right to expect the motorman to use proper care in running the car so as to avoid collisions or a dangerous approach to other vehicles, he also knew that in so crowded a street and so narrow a way there was a constant liability to such a risk, either from a misjudgment of the motorman or of the drivers of other vehicles or from any sudden emergency that might arise. He could not under such circumstances so far surrender the responsibility for his safety to the servants of the defendant as not to concern himself at all about the increased hazards to which his position exposed him. But this is exactly what he did. Although aware of his situation and the risks which it involved, he stationed himself upon the running board, took hold of the uprights, manifestly with both hands, and so stood looking into the car. He did not even turn his body or his neck to look ahead or into the street; he did not see the cart until he was struck by the pole. He both knew the dangers and disregarded them. Judged by his conduct, he chose to abstract his attention from them, as in Holian v. Boston Elevated Railway, 194 Mass. 74, 76. The way in which he was standing naturally would tend to make a part of his body protrude beyond the line of the running board. The cart and the pole were in plain sight; they scarcely could have escaped his observation if he had looked ahead at all. Not only does this appear from his own testimony, but the witness whom he called, and who had been seated in the car, testified that the position of the cart and the pole could be seen for a considerable distance ahead; that the pole reached so far towards the track that it was evident that it would reach near to or partly over the running board, but that the plaintiff was looking into the car and not ahead.

In the Eldridge case already referred to, the plaintiff was looking ahead, and merely failed to observe the threatening danger. He was at least using some care. In the Pomeroy case, the plaintiff did not know of the particular danger that existed from the inclination of the trolley pole towards the track. The same is to be said of Mason v. Boston & Northern Street Railway, 190 Mass. 255; the plaintiff there had no notice or knowledge of the impending danger and no reason to be on his guard against it. In the case at bar, the plaintiff was aware of all the circumstances except the position of the cart and pole which struck him, and even a slight degree of attention on his part would have given him knowledge of this. He then readily could have put himself out of danger by temporarily stepping between the seats or perhaps even by drawing his body in a little from the edge of the running board.

The jury would not have been warranted in finding that the plaintiff was in the exercise of due care, and judgment must be entered on the verdict.

So ordered.

BEACH AND CLARRIDGE COMPANY vs. AMERICAN STEAM GAUGE AND VALVE MANUFACTURING COMPANY.

Suffolk. January 9, 1911. - March 1, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Practice, Civil, Conduct of trial: requests for rulings, judge's charge, Exceptions, Auditor's report. Contract, What constitutes, Modification, Performance and breach, Construction. Words, "A term of years."

Where, at the trial of an action for the alleged breach of a contract to purchase certain land, there was evidence warranting a finding that an offer in writing by the defendant to purchase the land was accepted orally by the plaintiff, a special finding by the jury that such offer was so accepted renders immaterial an exception by the defendant to a refusal by the presiding judge to rule that, if there was no unequivocal oral acceptance of the offer, a formal agreement, offered later by the plaintiff to the defendant for his signature and containing terms varying from the defendant's original offer in writing, was a counter proposition which put an end to the offer.

When an offer in writing to purchase real estate is accepted orally by the owner, a binding contract is made, which is not affected by subsequent negotiations of the parties in an effort to agree upon a modification of the contract unless such negotiations result in an agreement for such a modification.

At the trial of an action for the alleged breach of a contract to purchase certain land, where there was evidence tending to show that the defendant in writing offered to purchase the land and that one F., acting on behalf of the plaintiff with authority, orally accepted the offer and thereafter offered to the defendant for his signature a formal agreement containing terms varying from the defendant's original offer in that it provided for the payment of an additional \$5,000 of the purchase price at the time of the delivery of the deed, the judge instructed the jury as follows: "If there had been an unconditional oral acceptance of the offer, then F. had a perfect right to draw up this additional suggestion or contract without impairing his rights under the oral acceptance. . . . If you find that this written contract, which was drawn up by F. [after the alleged oral acceptance], was intended by him to be an acceptance, and he thought it was an acceptance, of the contract, and it was an attempt on his part to accept it, and it was not intended by him to be a counter offer modifying the terms already in the offer, then it would not be a rejection of the offer, if it was not intended by him to be a counter offer. If you find that he had not orally accepted the offer earlier, why, then that would not be a rejection of the offer. . . . If F. had accepted orally the offer, and was intending merely to finance the situation and try to get the other \$5,000, that is not a rejection. If, also, he thought that this written proposition which he sent was, in substance, an acceptance of it, and if he intended it to be an acceptance and did not intend to make a definite counter offer, then the right of the plaintiff to accept the offer would still remain open." Held, that these instructions were sufficiently favorable to the defendant.

A letter from one corporation to another contained the following offer: "Gentlemen: I am authorized by our board of directors to offer you the sum of \$100,000

for your property on Camden Street in Boston which we are now occupying on a lease, the terms to be as follows: \$5,000 cash when signing papers, \$5,000 cash on delivery of the deed, remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we shall pay you the sum of \$11,000 per year, you to pay interest on the mortgages and taxes, and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1908." The offer was accepted orally. Held, that a binding contract arose, because such offer contained a sufficiently definite and certain statement of all the essential terms which the parties then intended to introduce into their contract, and was not too indefinite to be the foundation of a final contract; affirming Beach & Clarridge Co. v. American Steam Gauge & Value Manuf. Co. 202 Mass. 177.

Upon the acceptance by the owner of certain land of an offer by a corporation to purchase the land, one of the terms of the offer being that the owner should "arrange for renewal of first mortgage [which was in force and overdue] or extension of it until it can be placed for a term of years," a binding agreement arises, and, if the owner is ready to carry out the agreement on his part, but the corporation refuses to take the land unless the mortgage is extended for at least three years, the owner by such refusal is excused from further performance or offer of performance on his part, and is entitled forthwith to maintain an action against the corporation for breach of the agreement.

At the trial of an action for an alleged breach of a contract to purchase land, by which it was provided that the owner should "arrange for renewal of" a first mortgage then in force upon the land and overdue "or extension of it until it can be placed for a term of years," where it appeared that the purchaser refused to carry out the agreement unless the mortgage was extended for three years, an instruction to the jury that "a term of years" "means not less than two years" and that, if the owner "was able to get a mortgage for two years . . . that was a compliance with the contract in that respect," is sufficiently favorable to the purchaser, and the judge need not rule at the request of the purchaser that "three years is not an unreasonable interpretation."

The contract which arose when the owner of land subject to a mortgage accepted an offer of a corporation to purchase the land, the offer containing a provision that the owner should "arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, [the owner] to pay a sufficient sum on the first mortgage to get it extended," did not require any particular or definite renewal or extension of the first mortgage, but only such a renewal or extension that it could be placed for a term of years, and that the owner should pay a sufficient sum to procure such an extension.

When at a trial a report of an auditor is introduced in evidence and contains rulings upon mixed questions of law and fact such that the rulings of law cannot be distinguished from the findings of fact, it is proper for the judge in his charge to give to the jury the correct rules of law on the subjects dealt with in the report and to instruct them to disregard that part of the report which states the law differently.

No exception lies to the refusal of the judge presiding at a trial to give a ruling which assumes as true facts which are in dispute.

A judge presiding at a trial is not bound at the request of one of the parties to single out any part of the case for comment in his charge to the jury.

CONTRACT for the alleged breach of an agreement to buy a parcel of land with the buildings thereon numbered from 208 to 220 on Camden Street in Boston. Writ in the Supreme Judicial Court dated April 8, 1904.

The case was referred to Frank N. Nay, Esquire, as auditor, who filed a report favorable to the defendant. Thereafter there was a trial before *Hammond*, J., who ordered a verdict generally for the defendant. The plaintiff alleged exceptions which were sustained in a decision reported in 202 Mass. 177.

The case was tried again before Rugg, J.

It appeared that in November of 1903 the plaintiff owned the premises in question subject to a mortgage for \$57,000, which was overdue and was held by a corporation having its usual place of business in New York City, and subject also to a ten years' lease to the defendant, which contained an option permitting the defendant to purchase the property at any time before August 8, 1908, for \$200,010; that, previous to November 25, 1903, there had been negotiations from time to time looking toward a sale of the property to the defendant. On the morning of that day, according to the testimony of Maurice Douglas Flattery, Esquire, counsel for the plaintiff in the transaction, as a result of a conversation with officers of the defendant in which he said that, if the defendant would offer to purchase the property on certain terms for \$110,000, he would do his best to get the plaintiff to accept the offer, one Phillips, the secretary of the defendant, wrote to Mr. Flattery the following letter: "Boston, Nov. 25, Mr. Flattery, Dear Sir - I have been over the matter of offer for Camden St. property and our directors will not agree to pay a cent more than \$100,000 and any other proposition would be useless. I herewith submit offer and beg to state that we could probably pay you for first payment 5000 more on a note if you wish to accept this offer. I can do no more with them. Sincerely, Ralph B. Phillips."

Enclosed with the letter was the "offer" therein referred to, which was as follows: "Boston, Mass., Nov. 25, 1903. Messrs. Beach & Clarridge Co., Boston, Mass. Gentlemen: I am authorized by our Board of Directors to offer you sum of one hundred thousand dollars (\$100,000) for your property on Camden Street in Boston which we are now occupying on a lease, the

\$5000.00 cash on delivery of the deed, Remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we will pay you the sum of \$11,000 per year, you to pay interest on the mortgages and taxes, and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1903. Respectfully submitted, American Steam Gauge & Valve Mfg. Co., by Ralph B. Phillips Sec'y."

Mr. Flattery further testified that, upon receiving the offer, he called a meeting of the plaintiff's board of directors, that they accepted the offer, and that, from the room where the directors were present and in their hearing, he called up Phillips on the telephone. As to the ensuing telephone conversation, he testified: "I told him that the board of directors, that were present in the room while I was speaking, they had formally voted to accept the offer and they so instructed me to say, — to notify the American Steam Gauge and Valve Company that we accepted the offer, but, as between him and me, -a personal matter, - I would look to him to try and get the extra \$5,000 which he promised in the personal letter accompanying his offer." The plaintiff's board of directors were present when the telephone conversation took place and it was with their authority. Phillips replied, "Now that we got together on the purchase and sale, I will do my best to get the \$5,000. I think I will be able to fix that up this evening."

Mr. Flattery at once entered into negotiations with the mortgagee for an extension of the mortgage. On November 25, Mr. Flattery sent to the defendant a formal agreement, which contained provisions for the payment by the defendant of \$5,000 on the signing of the agreement and \$10,000 on the delivery of final papers. In conference later with Phillips and the defendant's counsel, Walter A. Webster, Esquire, the counsel suggested a number of changes in the formal agreement, and Mr. Flattery testified that he said to Mr. Webster, "What is the use of trying to change this now when you have made a written offer which

we have accepted?" that Mr. Webster turned to Phillips and said, "Have you made an offer on this property?" and he said, "Yes; we made an offer last Wednesday." Shortly after that Mr. Flattery went to his own office and mailed to the defendant about one o'clock that day a letter as follows: "Boston, Dec. 1, 1903. American Steam Gauge & Valve Co., 212 Camden St., Boston, Mass. Gentlemen:—In reply to your letter of November 25th 1903, offering us a sum of \$100,000 (one hundred thousand dollars) for our property, which you now occupy—I am authorized by our Board of Directors to accept your offer on the terms proposed by you and we hold ourselves in readiness to sign formal agreements and make a deed of the property. Yours truly, Beach & Clarridge Co. of Boston by M. Douglas Flattery, Counsel for Beach & Clarridge Co."

Mr. Flattery further testified that he called at Mr. Webster's office again that day, a little after three o'clock, and Mr. Webster and Phillips were there. Mr. Webster then handed to him a letter reading as follows: "Boston, Mass. Dec. 1, '03. The Beach & Clarridge Co., C/o M. Douglas Flattery, #8 Beacon St., Boston. Dear Sirs: — The offer which I made to the Beach & Clarridge Company on Nov. 25, 1903 regarding the purchase of their property on Camden Street, Boston, Mass., I hereby withdraw as this offer has not been accepted. Yours truly, Ralph B. Phillips." Mr. Flattery refused to receive the letter on behalf of the plaintiff.

Subsequently the defendant refused to purchase the property from the plaintiff unless an extension of the mortgage for three years could be obtained. Thereupon the mortgagee foreclosed the mortgage by sale and the defendant purchased at the sale

Much of the testimony of Mr. Flattery was controverted by witnesses for the defendant.

At the close of the evidence, the defendant asked for the following rulings, among others:

- "5. If the plaintiff accepts the offer (or makes an attempt to accept it) with any condition, change, or modification, this constitutes in law a new proposal, and is a rejection of the original offer.
- "6. The plaintiff, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it; a rejection puts an end to the original offer.

- "7. If you find that the plaintiff did not make an unequivocal oral acceptance of the defendant's offer, the agreement executed by the plaintiff and sent to the defendant on November 25 was a counter proposition which put an end to the offer.
- "8. The continued negotiations of the parties after November 25 in an attempt to reach an agreement upon terms not included in the original offer put an end to the defendant's offer."
- "12. A term of years cannot mean less than two years, and three years is not an unreasonable interpretation."
- "14. A refusal of the defendant to accept anything less than a three years' extension of the mortgage was reasonable and did not constitute a breach of its agreement."
- "27. The best test of the fair market value is the amount which the property would bring where the seller wants to sell and the purchaser wants to buy.
- "28. In considering the amount received for the property at the foreclosure sale you may consider the fact that the sale was not extensively advertised; that no effort was made to secure bidders and that there were only two bidders, as bearing upon the question whether it was a true criterion of the value of the property.
- "29. The price of \$100,000, agreed upon by the parties, is evidence of the value of the property.
- "30. It is for you to find whether the defendant's offer was given and continuing on December 1, or whether the parties, by their negotiations upon terms differing from those of the defendant's offer, treated it as at an end and were trying to reach a new agreement upon other terms.
- "31. If you find that the defendant told the plaintiff before December 1 that it would not accept any extension of the mortgage for less than three years, then you may find that that was notice to the plaintiff that the defendant did not intend to be any longer bound by its offer for an extension for a less time."

The plaintiff asked for the following rulings:

- "1. If there was an acceptance by telephone on November 25 of the offer contained in the defendant's letter of that day, that constituted a binding contract.
- "2. Neither the formal agreement signed by the plaintiff and sent to the defendant on November 25, nor the subsequent ne-

gotiations for an additional payment of \$5,000, amounted, as a matter of law, to a rejection of the offer contained in the defendant's letter of November 25.

- "3. Even if there were no oral acceptance of the offer, the letter of acceptance on behalf of the plaintiff on December 1 was a good acceptance and made a binding contract.
- "4. The letter of Mr. Phillips to Mr. Flattery on December 1 was not a revocation of the offer contained in the defendant's letter of November 25.
- "5. If the letter of December 1, accepting the contract, was put into the mail before the letter of revocation was served on Mr. Flattery on that day, the attempted revocation was ineffective, and the defendant's offer of November 25 became a binding contract.
- "6. By the terms of the contract the plaintiff was not bound to obtain an extension for three years of the existing mortgage, but only a temporary extension to enable a mortgage for a term of years to be arranged, and an extension for one year was sufficient.
- "7. Under the terms of the contract the defendant was not entitled to insist upon an extension for three years of the existing mortgage.
- "8. If the defendant refused to accept anything less than an extension for three years of the existing mortgage the plaintiff was excused from further performance and is entitled to recover.
- "9. That the jury be instructed to disregard those portions of the auditor's report to the effect that the agreement prepared by Mr. Flattery and the modifications made on behalf of the plaintiff in the offer received from the defendant on that day amounted to a rejection of the offer so that the offer was no longer open, and that a direct and unequivocal acceptance would have left the plaintiff's company in no position to seek this modification if the bargain had been previously closed, and also to disregard so much of the report as construes the offer of November 25, and particularly that part which says that the extension referred to in the offer cannot mean less than two years.
- "10. That upon the facts stated in the auditor's report the ruling that there was no legal and binding contract was erroneous, and must be disregarded."

On the subject matter of the twelfth ruling asked for by the defendant, and the sixth ruling asked for by the plaintiff, the single justice charged the jury as follows: "If you find that there was an acceptance, either orally, or, if not oral, written, then you proceed to the consideration of the second branch of the case, which is whether the defendant broke this contract. And as that involves a consideration of just what each party was obliged to do under the contract, therefore I invite your attention somewhat critically to the terms of this offer. It was for a gross price of \$100,000 - \$5,000 to be paid down and \$5,000 to be paid on the delivery of the deed, and the proceeds of the remainder to remain on mortgage, 'you to take a second mortgage with interest at five per cent and arrange for a renewal of the first mortgage, or an extension of it, until it can be placed for a term of years.' Now that means either a renewal of the first mortgage for the term which it originally ran, - and about that there is no dispute, as I recall it now, so I think you need not trouble yourselves about that aspect of the case, but proceed to the second question which is 'either an extension or a renewal of it until it can be placed for a term of years.' Now that does not mean that the plaintiff agreed to get continued this particular mortgage held by the Cannabis Company of New York. simply means that this plaintiff agreed to get an extension of that mortgage until it could get either that mortgage extended for two years or a new mortgage for two years. That is, the plaintiff would have performed its contract if it had this New York lawyer's client's extension for a week or a day, provided within that time it could get the mortgage placed for a term of years somewhere else. It might have gone to another savings institution or to an individual and got a mortgage for two years. That would have complied with the terms of the contract. It was necessary that it should get this mortgage extended, which was overdue at the time the contract was made, or that it should get a mortgage for this amount placed for a term of years. instruct you that than means not less that two years, and if it was able to get a mortgage for two years, - if you find upon all the evidence that it could, that was a compliance with the contract in that respect. Now it was to get the mortgage extended in view of this contract; that is, the mortgage was \$57,000; the contract itself provided that there was at least \$10,000 to be paid before it was obliged to get the mortgage extended; so that the defendant's obligation was only to get a mortgage for \$47,000, instead of the face value of \$57,000 which existed at the time the contract was made. Of course, it would have complied with the contract by getting a mortgage for \$57,000, but it was not obliged to do so, because if the other side performed its contract to pay \$10,000 the plaintiff would have that in hand with which to reduce the principal of that second mortgage. So that you may find on the evidence that these New York parties would not extend for two years for \$57,000, or more than one year or six months; it is still open for you to find that the plaintiff was able to perform its part by getting its mortgage placed somewhere else; so that the defendant would have had only a total mortgage indebtedness on the property for \$90,000. Now it is necessary for you to find that the plaintiff was able, would have been able if the other side carried out its contract, to place mortgages in the aggregate for \$90,000. you see the first mortgage would have to run for at least two years. Now you are to find whether the plaintiff was in a position to do that. You have a right to take into account the fact that he wrote a letter for the purpose of getting \$10,000 to carry out that part of its contract. You are to take that and all the other circumstances. There was some evidence as to the opinion of witnesses as to how easy it would have been to get a mortgage placed for that period of time for \$47,000. Flattery gave some testimony on the stand. His opinion was about the ease with which he could do that had the contract been carried out by the other side."

The other rulings asked for by the defendant were refused.

On the question of damages, the single justice charged the jury as follows in part: "Now the rule of damages is this: The plaintiff is entitled to recover the difference between the contract price of \$100,000 and the fair market value of the property, if it was less than \$100,000. If you find, for instance, merely by way of illustration, if you find that the price this property brought at auction was \$60,000, and was the fair market value of the property, then your verdict should be for the plaintiff for the difference between \$100,000 and \$60,000.

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If you find, on the other hand, the property was worth \$100,000, or over, then the plaintiff has really suffered no damages because of that oral contract with the defendant, because the property was worth just as much to it. Therefore, if you find that, you would bring in only one dollar nominal damages. Now the fixed point on that side is the contract price of \$100,000, and you are to find, upon all the evidence, what was the fair market price of this property. Now the fair market value is what an owner who is willing to sell, and is not obliged to sell, and a purchaser who is under no obligation to buy, but is willing to buy, - what price both would agree upon, - what one would sell and the other would buy for. You have various items of evidence respecting the market value of this property. which will aid you in coming to a conclusion on this point. You have, first, what the property brought at the foreclosure sale, and you have a right to take into account, and ought to take into account in weighing the worth of that evidence, the circumstances under which the sale occurred. It was a mortgagee's sale. You know what that means; perhaps some arguments have been addressed to you about it. You are to take into account, in connection with this sale, the particular circumstances under which this sale was had, and you will recall the evidence from the mortgagee, from the attorney in New York, as to how extensively this sale was advertised."

The single justice also submitted to the jury the special question, "Was the offer of November 25, 1903, accepted orally by the plaintiff?" The jury answered the question "Yes," and found for the plaintiff in the sum of \$46,446. The defendant alleged exceptions.

G. W. Anderson, (E. H. Ruby with him,) for the defendant. H. E. Warner, (J. A. Crane with him,) for the plaintiff.

SHELDON, J. The jury have found, as upon the evidence they had a right to find, that the defendant's written offer of November 25, 1903, was accepted orally by the plaintiff. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 202 Mass. 177, and cases cited. This makes the defendant's seventh request for instructions immaterial, and the exception to its refusal need not be considered.

No exception appears to have been saved to the refusal of the

defendant's fifth and sixth requests, so far as they were not given. At any rate, they were made immaterial by the finding already stated.

The defendant's eighth and thirtieth requests were rightly refused. There was nothing inconsistent in the plaintiff's acceptance of the defendant's offer and the conclusion thereby of a binding agreement with the effort afterwards to procure modifications of that agreement. Such modifications or an abandonment or abrogation of the agreement could be made only with the concurrence of both parties. Richardson Shoe Machinery Co. v. Essex Machine Co. 207 Mass. 219, 223, 224.

But the defendant contends that this finding was made upon rulings of which some were erroneous and others were insufficient and misleading. We have examined the instructions given with the evidence on which they were based, in the light of the very able argument addressed to us by the counsel for the defendant; and we are clearly of opinion that the instructions were full and accurate. Flattery's evidence upon this issue was plain and direct. The evidence for the defendant simply left this a question of fact. And the question was fairly left to the jury. The single justice said to them: "If there had been an unconditional oral acceptance of the offer, then Mr. Flattery had a perfect right to draw up this additional suggestion or contract without impairing his rights under the oral acceptance. If however he did not intend to accept orally, but intended to make a different and counter proposition, why then that amounted to a rejection of the original offer. If you find that this written contract, which was drawn up by Mr. Flattery on the afternoon of November 25, was intended by him to be an acceptance, and he thought it was an acceptance, of the contract, and it was an attempt on his part to accept it, and it was not intended by him to be a counter offer modifying the terms already in the offer, then it would not be a rejection of the offer, if it was not intended by him to be a counter offer. If you find that he had not orally accepted the offer earlier, why then that would not be a rejection of the offer. . . . If Mr. Flattery had accepted orally the offer and was intending merely to finance the situation and try to get the other \$5,000, that is not a rejection. If, also, he thought that this written proposition which he sent was, in

substance, an acceptance of it, and if he intended it to be an acceptance and did not intend to make a definite counter offer, then the right of the plaintiff to accept the offer would still remain open." This was sufficiently favorable to the defendant. The jury were not allowed, as the defendant has argued, to find an oral acceptance merely upon proof that Flattery intended to make it; they were told not to make the finding unless Flattery did so intend, which is a very different thing.

The defendant's thirty-first request also is made immaterial by the special finding. Of course an offer cannot be withdrawn after its acceptance.

Undoubtedly the plaintiff was bound to undertake the burden of coming to an agreement with the mortgagee so as to secure a renewal or extension of the first mortgage until it could be placed for a term of years. The single justice so ruled. the refusal which the jury must have found was made by the defendant, to accept a deed unless the mortgage was extended or placed for a term of three years excused the plaintiff from making any further attempt to carry out its part of the con-The law requires no vain or idle performance. This was not a mere anticipatory breach by the defendant; it operated also to excuse all further performance upon the other side, and entitled the plaintiff to recover, if the jury found that the plaintiff, provided that the defendant had been willing to comply with the agreed terms, would have carried out the agreement on its part. This was expressly decided when the case was formerly before us in 202 Mass. 177, 183, 184. As in Boyd v. Taylor, 207 Mass. 335, it is now the settled law of the case and needs no further discussion. It follows that the defendant's fourteenth request was rightly refused, and the rulings made were correct.

For the reasons already stated, the plaintiff's first and seventh requests were rightly given; its eighth request was properly dealt with; and upon the special finding the questions raised upon the plaintiff's third, fourth and fifth requests are now immaterial.

The defendant's twelfth request was given so far as it properly could have been.

The instructions given upon the plaintiff's sixth request were correct. The agreement required no particular or definite

renewal or extension of the first mortgage, but only such a renewal or extension that it could be placed for a term of years, and that the plaintiff should pay a sufficient sum to procure such an extension. This was the express language of the offer which the defendant made and the plaintiff accepted.

The instructions given upon the plaintiff's ninth and tenth requests were correct. An auditor's findings upon matters of fact are prima facie evidence. Upon a mixed question of law and fact, where the rulings cannot be distinguished from the findings, it may well be that the court cannot rule peremptorily that the jury must disregard any part of the report; but any bald rulings of law should be passed upon and if necessary corrected by rulings at the trial. Fisher v. Dos, 204 Mass. 34, 40. In a case like the one at bar, this could best be done by giving the jury the correct rule of law and instructing them to disregard that part of the report which stated the law differently. This was the course adopted.

The jury plainly could infer from the facts in evidence that but for the defendant's refusal to accept anything short of a three years' extension of the mortgage the plaintiff would have been able and ready to carry out the agreement as made.

As to damages, it was not assumed at this trial, as formerly it had been, that the market value of the property was the same as the price agreed upon. The defendant's president testified that its officers did not regard that price as representing the value of the property, but that it was what under the existing circumstances they were willing to pay for it rather than to lose their leasehold estate or continue to pay the agreed rent. It was a fair inference from his testimony that the defendant then agreed with the plaintiff's present contention that the real value was considerably less than the agreed price. The question was for the jury; and we can look only at the exceptions which were saved at the trial.

The defendant's twenty-seventh request was given in substance. Its twenty-eighth request assumed facts as true which were themselves in dispute. It could not have been given as framed. The trial judge was not bound to single out one part of the case for comment, as was called for by the twenty-ninth request. And both these questions were properly covered by

the rulings given. The reference in the charge to the "taxable value" of the property was not excepted to. The evidence as to this came in without exception, and indeed seems to have been drawn, without any restriction as to its purpose, from one of the plaintiff's witnesses by the defendant in cross-examination. Under such circumstances we should hesitate to sustain an exception to this part of the charge if the question had been saved.

We do not find that there was any error at the trial.

Exceptions overruled.

CHARLES B. CUDDY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 10, 1911. - March 1, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence, In use of highway, Street railway.

A traveller upon a street properly can be found to be in the exercise of due care if, in crossing a street upon a cross walk, he reaches a position between parallel tracks of a street railway, sees a car between twenty and thirty feet away on the track in front of him approaching at from eight to ten miles an hour, pauses to see if he will have a chance to go by, looks at the motorman, sees him give a distinct nod in the direction toward which the traveller is going, and thereupon starts on ahead of the car, keeping his eyes on the motorman whom he then sees turn his hand and thinks that he turns it in an effort to stop the car, which nevertheless runs into the traveller after he has taken two steps from his former position between the tracks.

Tort for personal injuries received by the plaintiff from being run into by an electric street car as described in the opinion. Writ dated April 26, 1907.

In the Superior Court the case was tried before Harris, J. The material facts are stated in the opinion. At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant and reported the case to this court for determination, the parties agreeing that, "if, upon all the evidence, including any evidence excluded against objection and exception which should have been admitted, and excluding any evidence admitted against objection and exception which should have been

excluded, the plaintiff was entitled to go to the jury, then a judgment should be entered for the plaintiff in the sum of \$1,300; otherwise judgment to be entered on the verdict for the defendant."

R. Homans, (A. G. Grant with him,) for the plaintiff.

W. G. Thompson, (R. Spring with him,) for the defendant.

SHELDON, J. While the plaintiff was in a safe position between the inward and the outward bound tracks of the defendant's railway, having crossed the former track upon his way across the street, he saw a car approaching him upon the outward track at a distance from the cross walk on which he stood, which he put at from ten to fifteen feet, but which upon the testimony of Hanley and the distances shown upon the plans that were in evidence, the jury might have found to be twenty or possibly thirty feet. He went on in front of the car, which also kept on without any apparent abatement of its speed, until he had stepped upon the outward track, or just before that, when he testified that he thought it "kind of slowed down." He was struck by the car and was injured. On cross-examination he said that when he last saw the car it was going practically as fast as when he first saw it, and this was "a pretty good clip," which he defined as "a good horse trot." His other witness put the speed of the car at eight or ten miles an hour.

If this were all of the case, it would be plain that he was not in the exercise of due care, and that the verdict for the defendant was rightly ordered. One who without excuse steps in front of a swiftly moving car already so dangerously near to him cannot recover for an injury to which he has thus contributed. We need refer only to a few of the many cases which have established this proposition. Mathes v. Lowell, Lawrence & Haverhill Street Railway, 177 Mass. 416. Madden v. Boston Elevated Railway, 194 Mass. 491. Casey v. Boston Elevated Railway, 197 Mass. 440. Rundgren v. Boston & Northern Street Railway, 201 Mass. 156. Cohen v. Boston Elevated Railway, 202 Mass. 66.

But the plaintiff testified further that when he saw the oncoming car "he paused to see if he would have a chance to get by, and after pausing looked around to the motorman, and that the motorman gave a distinct nod in the direction from the plaintiff," and that it was only after this that he attempted to cross the track. He testified also that after he started to cross this track he kept on moving, and believed that he took two steps before he was struck; that after he started across he was looking at the car, keeping his eyes on the motorman, whom he saw in the vestibule; that he saw the motorman turn his hand; that he thought the motorman made an effort to stop the car, though without producing any particular effect upon it.

It is contended for the plaintiff, and in our opinion the jury could have found, that in attempting to cross the track he was acting upon what he properly believed to be the invitation of the motorman, and that this was an assurance that he could cross with safety, such as in the exercise of reasonable prudence he had the right to act upon. He might believe that the motorman, having given him this invitation and assurance, at once would check the speed of the car so as to allow him the few seconds that were needed. If he saw the motorman turn his hand, the jury could infer that this was done in turning the brake handle for that purpose, and that this, accompanying the nod of the head, was a further assurance of safety. It is not unusual for persons having occasion to cross the streets in the neighborhood of cars, automobiles or other rapidly moving vehicles, to receive and to rely upon such signals from motormen, chauffeurs or drivers. That the speed of the car was perhaps not diminished after he stepped upon the track does not affect the question of what he had a right to expect when he went upon the track. In O'Brien v. Lexington & Boston Street Railway, 205 Mass. 182, 184, some stress is laid upon a signal given by a nod of the head.

In view of the exclusion of the plaintiff's testimony in answer to the inquiry whether he thought there was any danger in doing as he did (see Jeddrey v. Boston & Northern Street Railway, 198 Mass. 232, 235), it cannot be argued that he did not rely upon what he saw or thought he saw done by the motorman.

The defendant has not contended that if the plaintiff was in the exercise of due care, there was not evidence of its negligence.

The case is very close; and it may be that the weight of the evidence is against the position of the plaintiff. We are of opinion, however, that there was some evidence tending to show

that he was exercising due care. See Sweeny v. Old Colony & Newport Railroad, 10 Allen, 368, 877; Hanley v. Boston Elevated Railway, 201 Mass. 55; Powers v. Old Colony Street Railway, 201 Mass. 66; Hatch v. Boston & Northern Street Railway, 205 Mass. 410. Hunt v. Old Colony Street Railway, 206 Mass. 11.

Upon the terms of the report and the stipulation of the parties, judgment must be entered for the plaintiff for the sum therein stated.

So ordered.

LOUIS S. CHASE vs. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Louis S. Chase, administrator, vs. Same.

Sumner H. Hancock vs. Same.

Inving H. Page vs. Same.

Alice J. Page vs. Same.

Worcester. January 10, 1911. — March 1, 1911.

Present: Knowlton, C. J., Loring, Bralley, Sheldon, & Rugg, JJ.

- Negligence, In use of automobile. Automobile. Sale. Corporation. Evidence, Opinion, Best and secondary, Competency, Presumptions and burden of proof. Words, "Sold."
- A person driving an automobile on a country road and approaching a grade crossing of a railroad with the road, which has no gates or a flagman, is not in the exercise of due care unless he looks and listens for approaching trains in a reasonable way before attempting to cross the railroad, and the fact that he can stop near the track for this purpose with greater convenience than can the driver of a horse will be considered in passing upon the question of the reasonableness of the way in which he looks and listens.
- If the driver of an automobile, who is approaching an open grade crossing of a railroad with the highway on which he is travelling, is perfectly familiar with the crossing and knows that a train may come from either direction at any moment, and with this knowledge drives his car within about fifteen feet of the track before he perceives that a train is approaching on it and then attempts to cross and is run over by the train, he is not in the exercise of due care, even if he was running his car at the rate of only from twelve to fifteen miles an hour until he was very close to the track when he reduced his speed to eight miles an hour, and even if it is possible, although not probable, that the train was run-

ning faster than twenty-five miles an hour and that no bell was rung or whistle blown as the train approached the crossing.

Where a manufacturing corporation, which as a part of its business conducts an automobile department, transfers by a bill of sale to another corporation, newly organized by the officers and stockholders of the older corporation for the purpose of accepting such transfer and of carrying on the automobile business, such of its assets as belonged to such department in return for capital stock of the new corporation which at once is distributed among the stockholders of the older corporation as a stock dividend, the transfer constitutes a sale of such assets, although there is no change in the location of the property transferred, and although a single person, acting in accordance with proper votes of the boards of directors of the respective corporations, on behalf of the older corporation delivers the bill of sale and receives for it the certificate of shares of capital stock of the new corporation, and on behalf of the new corporation receives the bill of sale and delivers therefor the certificate of shares of its capital stock, and although one provision of the bill of sale is that a settlement between the two corporations, as to what under certain of its provisions is due to or should be paid by the new corporation to the old on account of past business of the automobile department of the older corporation, is not to occur until a future time; and therefore in accordance with the requirements of St. 1903, c. 478, § 2, an automobile which was included in the assets so transferred and had been registered by the older corporation by a manufacturer's number, should be registered again by the new corporation, and any one using or riding in it upon the highway before it is again registered is using the highway unlawfully and cannot recover for injuries resulting from ordinary negligence of third persons.

Perhaps the word "sold," as used in St. 1903, c. 478, § 2, providing that, after registration in a certain way of an automobile or motor cycle by a manufacturer or dealer, the automobile or motor cycle "shall be regarded as registered" "until sold or let for hire or loaned for a period of more than five successive days," should be held to mean "sold and delivered," per Knowlton, C. J.

At the trial of an action in which a material question was the ownership of an automobile which the defendant contended had been sold by one corporation to a second, the plaintiff, who was the president of both corporations, in direct examination testified that the automobile belonged to the second corporation. In rebuttal, he testified that, after an examination of the books and papers of the corporation, he desired to change his testimony as to which corporation owned the automobile. All the books and papers which determined the question were in evidence and were undisputed, and, in the opinion of this court, showed that the automobile belonged to the second corporation. Held, that the testimony in rebuttal, being a mere expression of opinion, was not competent evidence on the question of the title to the automobile, when everything upon which the determination of that question depended was established by evidence from records and undisputed facts.

At the trial of an action in which a material question was, whether on a certain day one corporation had sold an automobile to another, all the books, papers and corporate records bearing upon the question were in evidence and were undisputed. The grantee corporation had been organized to take over the property and business of an automobile department of the grantor corporation, which manufactured firearms and machinery. The plaintiff was at the same time the president of both corporations. From the documentary evidence it appeared that a bill of sale of property including the automobile had been executed

by the plaintiff by authority of a vote of the board of directors of the grantor corporation and later had been approved and that stock had been issued there for by the board of directors of the grantee corporation. There was a provision in the bill of sale giving the grantee corporation the rights of the grantor corporation in all accounts of its automobile department at the date of the sale and that the grantee corporation should assume all the debts of the business at that date, and a further provision that at a date later than that of the bill of sale an accounting should be had and the balance adjusted as between the corporations. The plaintiff testified that he handed the bill of sale to his bookkeeper and told him to keep it until the time when the accounting should be had and then to turn it over to the grantee corporation. Held, that such testimony was not competent to show that the contract of sale did not take effect when the shares of stock of the grantee corporation were issued and delivered for it.

It is at least doubtful whether action of the board of directors of a business corporation at a meeting, of which a record was kept, can be proved by oral evidence, per Knowlton, C. J.

At the trial of an action in which a material question was, whether on a certain day one corporation had sold an automobile to another, all the books, papers and corporate records bearing upon the question were in evidence and were undisputed. The grantee corporation had been organized to take over the property and business of an automobile department of the grantor corporation, which manufactured firearms and machinery. The plaintiff was at the same time the president of both corporations. From the documentary evidence it appeared that a bill of sale of property including the automobile had been executed by the plaintiff by authority of a vote of the board of directors of the grantor corporation and later had been approved and that stock had been issued therefor by the board of directors of the grantee corporation. There was a provision in the bill of sale giving the grantee corporation the rights of the grantor corporation in all accounts of its automobile department at the date of the sale and that the grantee corporation should assume all the debts of the business at that date, and a further provision that at a later date an accounting should be had and the balance adjusted as between the corporations. The recording officer of the board of directors of the grantee corporation testified that at the meeting of that board at which the bill of sale was approved and stock was authorized to be issued therefor, the plaintiff had said "that the bill of sale would be held by" the grantor corporation "until the" time for the accounting and "at that time the books would be balanced and the bill of sale turned over to the" grantee corporation, and that "the directors said that would be all right." There was a formal record of the meeting which contained no mention of such action. Held, that, aside from the question whether action of the board could be proved by oral evidence under the circumstances, the testimony had no tendency to prove that the title to the automobile had not passed before the date of accounting, and could only be interpreted as referring to the complete surrender of the books and papers when the balances had been made up on the books, as contemplated by the bill of sale, after the instrument had taken effect and the property had

The statutes requiring signals to be given by locomotive engines approaching crossings at grade of railroads with public ways are intended only for the protection of persons who rightfully are upon the public ways.

A person driving or being transported upon a highway in an automobile which is not registered according to statutory requirements has not the rights of a traveller lawfully upon the public way.

Knowlton, C. J. These are five actions to recover damages caused by a collision of an automobile in which the plaintiffs were riding, with a locomotive engine and a combination passenger and baggage car of the defendant, at a crossing of the highway by the railroad in East Brookfield, on August 21, 1906. The second of the actions is for the death of the first plaintiff's intestate, caused by this accident. Each of the others has counts at common law, as well as a count under the St. 1906, c. 463, Part II. § 245, founded upon the alleged neglect of the defendant to give the signals required by law at railroad crossings. A great variety of questions arose at the trial,* some of which it will not be necessary to decide. It was arranged with the judge, by agreement of counsel, that the five cases, with another brought by the Stevens-Duryea Company to recover damages for injury to the automobile, should be submitted to the jury, and that if verdicts for the defendant were returned in any of the cases the findings of the jury should be final. If they should find for the plaintiff in any of the cases, the verdicts were to be set aside. and the cases reported to this court upon the question whether the judge was justified as a matter of law in submitting them to the jury. If he was not, judgments were to be entered for the defendant. If the cases were rightly submitted, judgments were to be entered for the plaintiffs upon the verdicts, subject to certain stipulations as to possible motions for a new trial on the ground of excessive damages, which are not now material.

The question before us is whether, upon such of the evidence as is material and competent, the cases could properly be submitted to the jury. Ordinarily the first inquiry upon such a report is whether there was evidence of negligence of the defendant or its servants. The accident happened at a crossing of the branch of the defendant's railroad that runs four miles from East Brookfield to North Brookfield. The highway at that point runs nearly east and west and the railroad nearly north and south, although the two roads at the crossing are not exactly at right angles, the larger angle between them being at the right of the plaintiffs as they approached the crossing, which was the direction from which the train came, and the smaller angle being at their left. The plaintiffs were going westward

[·] Before Sanderson, J.

on their way from Boston to Chicopee Falls. The accident happened at about twelve o'clock, on a bright day in August. The plaintiffs were riding in an automobile of fifty horse power, weighing about thirty-seven hundred and fifty pounds when empty, designed to carry seven passengers, and capable of going at a speed of sixty miles an hour when carrying five persons. Hancock, who was running the automobile, was a chauffeur of large experience, who has driven automobiles in different races, and who drove one of this kind a mile, in one race, at a speed of seventy miles an hour. He was familiar with this crossing, having driven over it many times in each direction. The plaintiffs Irving H. Page and Alice J. Page had been over it a considerable number of times, and had observed it in passing. Neither the other plaintiff nor his wife, the intestate, had ever passed over it.

The country for a considerable distance on the highway and along the railroad is nearly level. The ordinary sign on the highway to warn travellers of the danger of the crossing was maintained, and the plank on the crossing, cattle guards at the sides, and other objects, showed plainly that this was a railroad crossing. The highway was a dirt road, hard, in good condition and descending at a very slight grade in the approach to the crossing from the east. From most points on the way, for a considerable distance east of the crossing, a train approaching from the north could be plainly seen, although there were points where the view would be obstructed by houses, trees or shrubbery. An engineer, who presented a plan made from a survey, testified to the distances from the crossing up the track, northward, that a person standing in the middle of the railroad could be seen from points in the middle of the highway at different distances from the middle of the crossing. From a point ten feet east of the crossing one can see up the track eight hundred and thirty-three feet; from a point twenty feet east, seven hundred and thirteen feet; from a point thirty feet east, six hundred and thirteen feet; from a point forty feet east four hundred and thirty-three feet, and so on, with gradually diminishing distances from points at intervals of ten feet of additional distance eastward, until, from a point one hundred and seventyfive feet east, one can see up the track only one hundred and

eighteen feet. The crossing is in a country town, but there is quite a large amount of travel over it. The trains over this branch road are very few.

Plainly the corporation itself could not be found to be negligent in maintaining this crossing at grade, on a country road, with the sign and other appointments described in the testimony. It was within the authority of the statute. There had been no requirement by the railroad commissioners under the provisions of the R. L. c. 111, § 192, that gates, or a flagman, or an electric signal, should be maintained there, and the conditions shown in the evidence were not such as would warrant the jury in finding negligence on the part of the corporation in failing to provide such appointments voluntarily. Hubbard v. Boston & Albany Railroad, 162 Mass. 132, 135. Commonwealth v. Boston & Worcester Railroad, 101 Mass. 201.

The only negligence on the part of the defendant's servants for which there is a possible ground of contention was in running the train too rapidly, or in failing to give the statutory signals required at crossings. As to the first, it appeared that there are no stopping places between North Brookfield and East Brookfield. The running time is ten minutes for the four miles. There were numerous witnesses who testified as to the speed of the train at the time of the accident, no one of whom estimated it at more than twenty-five miles an hour. The weight of the evidence tended to show that the train was running at from twenty to twenty-five miles an hour. The only evidence upon which the plaintiffs rely, as tending to show that it was going faster than this, is the testimony of the engineer, who was asked in cross-examination as to the rate at which he was running in different parts of his course. He gave estimates of miles per hour, from which the plaintiffs' counsel compute the time spent in going his first mile as two minutes and thirty seconds, the time for the second mile as two minutes and twenty-four seconds, and the time for the third mile as two minutes and twentyfive seconds, making an aggregate for the three miles of seven minutes and nineteen seconds. He testified that the distance from North Brookfield to the crossing is three and one half miles, and that the train left North Brookfield at seven minutes before twelve o'clock, and he gave the time of the accident as

one minute past twelve o'clock, as nearly as he could judge. Upon these estimates and computations there were but fortyone seconds in which to run the last half mile before the accident, from which it is contended that the train was then running at the rate of forty-four miles an hour. Another witness testified that he heard the whistle and the crash of the accident, and he judged that there was an interval of twenty seconds between them. A speed of eighty rods in twenty seconds would be at the rate of forty-five miles an hour. Treating these figures as exactly correct, which were given only as general estimates both of time and speed, and substracting the aggregate of estimated time for each of the first three miles from another time thought to be about the time of the accident, and a number of seconds is obtained to represent the time of running the last part of the course, which would indicate a speed greater than twenty-five miles an bour. It is plain that running at the rate of twenty-five miles an hour is not evidence of negligence. is also plain that, if such a computation in seconds, founded only upon uncertain estimates made from judgment and memory, long afterwards, has any tendency to show that the train was then running faster than twenty-five miles an hour, it is hardly more than a scintilla of evidence to set against the other testimony in the case.

The testimony relied on to sustain the plaintiffs' contention that the defendant's servants were negligent in not ringing the bell and blowing the whistle is not more convincing. The witnesses who were in the automobile testified that they heard no bell or whistle and saw and heard nothing of the approaching train until it was right upon them. Twenty-four witnesses testified positively that they heard the whistle blown in the usual way as the train approached the crossing. Ten witnesses testified with equal positiveness to hearing the ringing of the bell. Several of these testified that it rang all the way from the signal post to the crossing, and several that they could not tell whether it was ringing all the way from the whistling post or only a part of the way. Not one of the witnesses who testified on this subject, other than the persons in the automobile, said anything which under the decisions could be received as evidence that the bell did not ring. Menard v. Boston & Maine Railroad, 150 Mass. 386, 387. Slattery v. New York, New Haven, & Hartford Railroad, 203 Mass. 453, 457, and cases cited. One of them testified: "I do not remember about the bell. I used to hear the bell and the whistle. I never minded them: I never minded the bell. I used to hear the whistle." Another said: "I heard the whistle. It was the usual sound of the whistle given by the train. I do not know as I can remember about the bell." Others testified in a similar way. No one of those who failed to hear the bell was shown to be in such a position, or to be giving such attention, that his failure to notice it was any evidence that it did not ring.

It would seem as if the same could be said of the four persons who were in the tonneau of the automobile. According to the testimony, they were engaged in conversation, telling stories and the like, and no one of them was giving any attention to the fact that they were approaching a crossing, or to the possibility of hearing a signal from a locomotive engine.

But, according to the testimony of Hancock, this cannot be said of him. He says he was giving attention to the place and the possible dangers. Under the decisions, his failure to hear the bell or whistle would be competent evidence tending to show that they were not sounded. Whether, in a case where the burden of proof was on him to establish the proposition that the whistle was not blown, a verdict in his favor could be permitted to stand against the testimony of twenty-four credible witnesses who said that they heard it, or whether it would be the duty of the judge to set aside such a verdict totics quotics, upon application, is a question that we need not decide. Upon this point too, there is little, if any, more than a mere scintilla of evidence that there was neglect to give the statutory signals.

Upon such counts submitted to the jury as required proof that Hancock, in running the machine, was in the exercise of due care, we think it plain that there was no evidence for their consideration. Upon his testimony at this trial, he was running this car at the rate of from twelve to fifteen miles an hour until he was very close to the track, when he reduced his speed to eight miles an hour. There was other testimony that he was running very fast. At the inquest which was held soon after the accident, he testified that he was going about fifteen miles

an hour approaching the crossing, and slowed up to about twelve miles an hour before the accident. A witness who talked with him on the day of the accident, inquiring how it happened, testified: "I asked him if he was going so fast he could not stop and he said, 'I was not running that car over twenty miles an hour.'" According to his testimony and that of the other witnesses in the car, neither he nor any of the others had any knowledge of the approaching train until they were within about fifteen feet of the track. He was perfectly familiar with the crossing and supposed that a train might come from either direction at any moment.

The rules of law applicable to the driver of a horse drawn vehicle approaching a railroad crossing have been laid down in many cases. He must look and listen in a reasonable way, so as, if possible, to secure his safety. The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses. As was said in Hubbard v. Boston & Albany Railroad, 162 Mass. 132, 136, "There are very few horses that can safely be stopped within fifteen or twenty feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look so near the track as to expose him to great danger from the fright of his horse if an approaching train would be near." The driver of an automobile is in no such danger. If his machine is a good one, it can be controlled easily and perfectly, and there is no danger from it if he stops to look and listen within six feet of the track. difference between automobiles and vehicles drawn by horses, in the application of the rule, has been recognized by the courts. In New York Central & Hudson River Railroad v. Maidment, 168 Fed. Rep. 21, the court said: "He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. . . . These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the VOL. 208.

side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the travelling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized." To the same purport is Brommer v. Pennsylvania Railroad, 179 Fed. Rep. 577. See also Spencer v. New York Central & Hudson River Railroad, 128 App. Div. (N. Y.) 789, affirmed in 197 N. Y. 507. With the statement of the law in the paragraph above quoted we entirely agree. With proper care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town. this case, considering that part of the testimony which is most favorable to the plaintiffs, there is no evidence that Hancock was in the exercise of due care; but, on the contrary, the accident seems to have been caused by his great carelessness.

We will not consider whether there was evidence that the other plaintiffs, or any of them, were personally in the exercise of care, or whether any or all of them were in such relations to Hancock as to be affected by his negligence, within the rules stated in *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309, and later cases.

There are undisputed facts which, in our opinion, are decisive of the cases. The automobile, up to the time of its completion or until about that time, belonged to the J. Stevens Arms and Tool Company, which was a manufacturer of fire arms, machines and other tools, and also of automobiles. The business of manufacturing and selling automobiles was conducted in a separate department called the automobile department. The pattern of automobile manufactured was called the Stevens-Duryea automobile, and this department of the business, during the last part of the time of carrying it on by this corporation, was sometimes called the Stevens-Duryea Company. Early in the year 1906 the officers and members of the J. Stevens Arms and Tool Company formed a plan to organize a corporation, to be called

the Stevens-Duryea Company, to take over the property and business of the automobile department of the J. Stevens Arms and Tool Company. On May 18, 1906, a majority of the directors of this corporation applied to the secretary of the Commonwealth for a certificate of incorporation for a new company to be known as the Stevens-Duryea Company, to have a capital stock of \$300,000, made up of three thousand shares, of a par value of \$100 each. Its authorized business was to be the manufacture and sale of automobiles, with a right to do other things which we need not mention. On May 18, 1906, a certificate of incorporation was duly issued in accordance with the application, containing a provision that the three thousand shares of capital stock should be paid for, to the amount of one thousand shares in personal property and machinery, and to the amount of two thousand shares in merchandise. The J. Stevens Arms and Tool Company had a license numbered 064, issued under the authority of the St. 1903, c. 473, § 2,* as a generally distinguishing number or mark, which operated as a registration of automobiles and motor cycles owned or controlled by it, until

^{*} The sections of the statute referred to are as follows:

[&]quot;Section 2. Every manufacturer of or dealer in automobiles or motor cycles may, instead of registering each automobile or motor cycle owned or controlled by him, make application upon a blank provided by said commission for a general distinguishing number or mark, and said commission may, if satisfied of the facts stated in said application, grant said application, and issue to the applicant a certificate of registration containing the name, place of residence and address of the applicant, and the general distinguishing number or mark assigned to him, and made in such form and containing such further provisions as said commission may determine; and all automobiles and motor cycles owned or controlled by such manufacturer or dealer shall, until sold or let for hire or loaned for a period of more than five successive days, be regarded as registered under such general distinguishing number or mark. The fee for every such license shall be ten dollars."

[&]quot;Section 5. Except as hereinafter provided, no person shall, on or after the first day of September in the year nineteen hundred and three, operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute unless licensed so to do under the provisions of this act. No person shall operate an automobile or motor cycle for hire, unless specially licensed by the commission so to do. No person shall employ for hire as chauffeur or operator of an automobile or motor cycle any person not specially licensed as aforesaid, and every chauffeur or operator for hire shall, while so acting, display the distinguishing number or mark assigned to him, in such manner as may be prescribed by the commission."

sold or let for hire, or lent for a period of more than five successive days. The automobile in which the plaintiffs were riding bore the number 064, and was being used under this general registration number of the J. Stevens Arms and Tool Company at the time of the accident. Its registration, by the terms of the statute, ceased when it was sold. The defendant contended at the trial that it was sold to the Stevens-Duryea Company before the accident, and was therefore unregistered, and was being used in violation of the St. 1903, c. 478, § 5.*

On July 6, 1906, a meeting of the directors of the Stevens-Duryea company was held, at which the following vote was passed: "Voted: that the property offered by the J. Stevens Arms & Tool Company and J. Frank Duryea in exchange for three thousand shares of common stock of this company appears to be reasonably worth the value of said stock and to be necessary for the purposes of the company. The same is hereby accepted in full payment for said shares of stock, and the proper officers of this company are hereby authorized and directed to receive duly executed bills of assignment, bills of sale, etc., of said property, and to issue in exchange, therefor, three thousand shares of the capital stock of this company to said J. Stevens Arms and Tool Company and J. Frank Duryea in proportion of two-thirds to said company and one-third to said Duryea, or to persons designated by them." On August 17, 1906, a meeting of the directors of the J. Stevens Arms and Tool Company was held, at which the bill of sale was read, a copy of which is included in the record of the meeting, running from this corporation to the Stevens-Duryea Company, purporting to sell and convey to the latter corporation, for a "consideration of one dollar and the other considerations hereinafter expressed," the receipt of which is acknowledged, all the property belonging to its automobile business, all of which is more fully described in a schedule annexed. It is admitted that the automobile used at the time of the accident was a part of this property. In the bill of sale were these provisions: "And whereas, for sometime past, and prior to the organization of the grantee corporation and in contemplation thereof, the said business of manufacturing automobiles has been kept by the grantor, as far as practicable,

See footnote on previous page.

separated from its other business, and has been known and called, sometimes the 'Automobile department,' and sometimes 'Stevens-Duryea Company,' and separate books of account have been kept showing not only the dealings on account of said automobile department with third persons, but also its accounts with the grantor corporation, which said books include a sales ledger, purchase ledger, cash book and journal,—all said accounts, books, bills, etc., are included in this conveyance, and the said grantee shall have full power to sue and collect the same either in its own name or in the name of the grantor, but at the expense of the grantee, and all accounts and liabilities due from and properly charged to said automobile department or said Stevens-Duryea Company heretofore, shall be assumed and paid by the grantee as a part of the consideration hereof.

"And it is further agreed that at or before the time of the taking of the next inventory of the grantee, the accounts heretofore existing between the grantor and its automobile department, designated as Stevens-Duryea Company, as shown by said books of account or otherwise, shall be balanced, and any indebtedness found to be due from said grantor to said department shall be paid to the grantee, and as a part of the consideration hereof, the grantee agrees to pay to the grantor any balance found to be due to it from said department. To have and to hold all and singular the said goods and chattels to the said Stevens-Duryea Company, and its successors and assigns to their own use and behoof forever. . . . The consideration of this conveyance, in addition to that above stated, is the transfer to the grantor of two thousand shares of the capital stock of the grantee, said two thousand shares being two-thirds of its entire capital stock."

The instrument contained covenants of title and warranty, and ended with a formal clause, reciting the signing of the name of the corporation and the affixing of its corporate seal by Irving H. Page its president and treasurer, on the seventeenth day of August, 1906. It had also at the end the words "Signed, sealed and delivered in presence of." The record of the meeting shows that, after the reading, the following votes were passed:

"Voted, that whereas it is deemed for the best interest of this company that the Automobile Department of the business, here-

tofore conducted by this company under the terms of a certain contract between it and J. Frank Duryea, should be established on an independent basis, and whereas a new corporation called the Stevens-Duryea Company has been formed for that purpose; that Irving H. Page, President and Treasurer, be and he is hereby authorized and instructed to execute in the name and behalf of the corporation the bill of sale which has been read, and to deliver the same to the proper officer of the grantee upon transfer to said grantee by said Duryea of all his interests, patent rights, etc., and upon receipt of two thousand shares of the capital stock issued by the Stevens-Duryea Company to persons designated by said Irving H. Page.

"Voted, that upon the sale and delivery of certain property of this corporation to the Stevens-Duryea Company and upon the acceptance by the treasurer in exchange therefor of certificates representing two thousand shares of the capital stock of the said Stevens-Duryea Company, the treasurer is hereby authorized and directed to transfer the entire two thousand shares of the said stock of the Stevens-Duryea Company to the stockholders of record in this corporation as and for a dividend, said stock to be issued to the stockholders of this company in proportion to their several holdings of its stock, and in the following amounts." Then follow the names of four stockholders, with the number of shares to be transferred to each, making two thousand shares in all.

This bill of sale was then signed, in the name of the corporation, by I. H. Page, president and treasurer, and the clause of attestation above quoted was signed by two witnesses. A meeting of the directors of the Stevens-Duryea Company was held on the same day an hour and a half later, and the record shows that the "bills of sale and assignments from the J. Stevens Arms and Tool Company and Mr. J. Frank Duryea to the Stevens-Duryea Company, were read and their form approved." The following votes were passed:

"Voted: that in accordance with the vote passed at the last meeting, the bills of sale and assignments which have just been read be accepted upon the conditions therein stated and that the entire three thousand shares of the capital stock of this company be issued in exchange therefor as follows: Two thousand shares to J. Stevens Arms and Tool Company. One thousand shares to Mr. J. Frank Duryea.

"Voted: that the sum of forty-five thousand dollars be, and the same is hereby appropriated for the payment of a dividend of fifteen dollars per share of the entire capital stock payable to stockholders of record at the close of this meeting."

On the same day all of the capital stock of the Stevens-Duryea Company was issued, being one certificate of two thousand shares issued to the J. Stevens Arms and Tool Company, bearing date August 17, 1906, signed by I. H. Page, President, and I. H. Page, Treasurer, which was receipted for on the 17th day of August, 1906, signed by the "J. Stevens Arms and Tool Company, by I. H. Page, Treasurer." Immediately after its issuance a writing was made upon the back of the certificate, assigning different numbers of the shares of the stock represented by it to the different members of the corporation, the J. Stevens Arms and Tool Company, in accordance with the distribution previously voted as a dividend. The remainder of the stock of the Stevens-Duryea Company was issued to J. Frank Duryea, in a certificate of one thousand shares, signed by I. H. Page, President, and I. H. Page, Treasurer, and receipted for on August 17 by Duryea. J. Frank Duryea assigned this certificate so as to divide the shares, giving some to other persons, and retaining some for himself. On this same day new certificates were issued to all the persons who were to receive the stock under the assignments and distribution provided for, all of which bore date August 17, and all of which were receipted for on the same day by the other persons to whom the certificates were issued. One of these certificates was issued to I. H. Page, and was receipted for by him. He was the president and treasurer of each of these corporations. These were the only votes or acts of either of the boards of directors touching the transfer of the property that appear in the case. Do they show a contract that took effect on August 17, or was there nothing but negotiations at that time, which did not ripen into a contract until long afterwards?

If there was any contract at all, it was that set out in the bill of sale, and it passed the title to the property described in the writing. There was nothing that bound either party until that

contract took effect. Nothing else in the form of a contract was referred to in their dealings with each other. We are of opinion that, upon the undisputed facts, the contract became binding when the Stevens-Duryea Company accepted the bill of sale which was offered to it in the meeting of its directors, and complied with the conditions on which it was to take effect. records show previous negotiations. The vote of the directors of this corporation on July 6 shows that the other corporation had previously offered the property for the stock, and the vote is an acceptance of the offer, and a direction to the proper officers of the company to receive the bills of assignment, bills of sale, etc., and to issue the three thousand shares of stock in exchange This shows an agreement of the two corporations upon the terms of the contract, and an arrangement for the completion of the formal contract later. Then, on August 17, the formal bill of sale having been prepared and read to the directors, there is a vote instructing the president and treasurer of the selling corporation to execute it and deliver it to the proper officer of the grantee, upon a transfer to the grantee of certain rights by Duryea, and upon the receipt of two thousand shares of its capital stock. Thereupon the president and treasurer executed the bill of sale, and took it to the meeting of the other corporation, held later on the same day. The record shows that the bills of sale and assignments from Duryea, together with this bill of sale, were there read and approved, and a vote was taken that they be accepted upon the conditions therein stated, and the capital stock be issued in exchange therefor. The capital stock was then issued by the purchasing corporation, and accepted by the selling corporation and by Duryea. The bill of sale was in the hands of Page, the president and treasurer of the selling corporation, who took it to the meeting under a vote of instruction to deliver it. It remained in the hands of the same person, who was also the president and treasurer of the purchasing corporation which had accepted it by vote and paid for it. ment was offered on one side and accepted on the other. The consideration was paid on one side and accepted on the other. Under these circumstances there was no need of a formal transfer of the paper from the right hand to the left hand of the person who was at the same time the president and treasurer of both

corporations. When that was done on both sides which was prescribed and intended to give the contract effect, it took effect. All this appears by the writing and the records. The writing shows that no formal delivery, or change of place of any of the articles of property was ever contemplated, and no such change was ever made in connection with the transfer. By the terms of the instrument the stock was to be given for the property. According to the terms of the instrument the stock was given for the property, and was accepted as taken in exchange for it. Moreover, the directors of the Stevens-Duryea Company, including Page, knew that the stock could not lawfully be issued except as paid for by the property. Two at least of the directors of the J. Stevens Arms and Tool Company also knew this fact, for they were at the same time directors of the Stevens-Duryea Company. The above recited facts, that took place on August 17, constitute a complete execution of the contract on both sides, excepting the ascertainment of the balances to be paid and accounted for, and the passing over of the books of account, which by the terms of the bill of sale were to be done after the title to the property had passed, "at or before the time of the taking of the next inventory of the grantee." The grantee neither had nor could have any property to inventory until after this contract had taken effect. The dividend of the purchasing company, voted on August 17, was paid to the stockholders by checks on August 27, and the J. Stevens Arms and Tool Company furnished the money for the purpose.

The oral testimony relied on by the plaintiffs cannot change the result which follows, as matter of law, upon the proper interpretation of the records. The plaintiff, I. H. Page, testified that the automobile belonged to the Stevens-Duryea Company at the time of the accident, meaning the corporation of that name. After the plaintiffs' case had been closed and the defendant had opened its defense showing its reliance upon the failure of that company to obtain registration of the automobile, he went to his place of business at Chicopee Falls, with two of his attorneys, and with them examined the books and papers of the corporation, and after his return he testified in rebuttal that he wished to change his former testimony as to the ownership of the automobile. Referring to the time of this examination of the books,

on a Saturday during the trial, he testified: "It was at that time I discovered that the change in the concern did not take place until September 1, 1906." In cross-examination he said: "From the time that the suit was brought in the name of the Stevens-Duryea Company until I took this stand last Monday, I thought that the Stevens-Duryea Company owned that automobile. . . . And I thought so when I was on the stand that day." His change of opinion seems to have come from a misinterpretation of the books and papers of the corporation in connection with an extended examination of them, made during the trial, after the plaintiffs had rested their cases. Every fact appearing in the transaction of the business and in the books and papers in evidence is consistent with a purpose to make up and balance the accounts, after the property had passed, in accordance with the terms of the bill of sale, at some convenient time either before or at the time of the making of its inventory by the purchasing corporation. The name of the purchaser was the same as that which the J. Stevens Arms and Tool Company had used to a considerable extent in conducting that department of its business. The business, seemingly, was to be carried on by the same persons and in the same way after the change in proprietorship as before. The interests of individuals represented in the business were nearly, although not exactly the same after the purchase as before. By the terms of the bill of sale the new corporation was to have the benefit of all old accounts afterwards collected, and in the subsequent accounting was to assume and pay all old bills then unpaid, just as it would receive and pay moneys in the business to be done after the accounts had been balanced. The fact that the parties made up their accounts and struck their balances as of September first, instead of August 17, has no tendency to show that the contract did not take effect and the property pass on August 17. The rights of the parties were fixed on that day, although the balances on the one side and the other would depend upon the collections and payments and the state of the accounts on the books up to the time of balancing. The pecuniary result to both parties would be the same, whether the accounts were made up on August 17 or on September 1.

The statement of Page in his testimony in rebuttal, that the

car belonged to the J. Stevens Arms and Tool Company at the time of the accident, is nothing more than his opinion, and it is not competent evidence to prove title when everything upon which the title depends is established by evidence from records and undisputed facts.

The testimony that Page handed the bill of sale to his bookkeeper, Leonard, and told him to hold it until September 1, when the inventory was taken, and then turn it over to the Stevens-Duryea Company, is not competent as evidence to show that the contract did not take effect. What had taken place between the two corporations gave the instrument effect, and it was then in Page's hands as evidence of a completed contract, held by him as president and treasurer of the purchasing corporation, for its benefit, as well as for the benefit of the selling corporation, in reference to the liability upon the accounts. So far as a technical delivery was important, what had previously occurred constituted a delivery, and Page had no authority to do anything that would deprive the purchasing corporation of the benefit of its contract. When the paper was afterwards in the hands of the bookkeeper he held it by Page's direction, and under his control. In legal effect, it was in Page's hands as an officer of the corporation.

The testimony of Remington was not competent, unless to show action of the board of directors. He said: "Mr. Page told the directors at that meeting [the meeting of the purchasing company on August 17] that the bill of sale would be held by the J. Stevens Arms and Tool Company until after the inventory was taken, which would be August 81, and at that time the books would be balanced and the bill of sale turned over to the Stevens-Duryea Company. . . . The directors said that would be all right." The records show that the directors held formal meetings, of which records were kept. Remington, who was the recording officer, made no record of such consent by the board. The by-laws of the corporation are not before us; but it is at least very doubtful whether the action of the board, at a meeting of which a record was kept, can be proved by parol. If the evidence was competent, it had no tendency to show that the title did not pass. The inventory referred to was that mentioned in the bill of sale, and that was to be an inventory of the grantee as owner. In view of all that passed between the parties, this remark can only be interpreted as referring to the complete surrender of the books and papers when the balances had been made up on the books, as contemplated by the bill of sale, after the instrument had taken effect and the property had passed.

By the terms of the statute the registration of the selling corporation was effective only until the automobile was sold. St. 1908, c. 473, § 2. Perhaps the word "sold" as here used should be held to mean sold and delivered. In the present case we have no occasion to consider this; for the possession and control of all the property passed on August 17. This registration could not afterwards cover the automobile unless it again came into the ownership or control of the selling corporation.

In Dudley v. Northampton Street Railway, 202 Mass. 443, and in Feeley v. Melrose, 205 Mass. 829, it was held that a person riding upon a highway in an unregistered automobile cannot recover for an injury caused by the negligent conduct of another traveller. In Doherty v. Ayer, 197 Mass. 241, a similar doctrine was stated in reference to a plaintiff claiming damages caused by a defect in a highway. The plaintiffs contend that the principle is not applicable to the claims in these actions, founded on the statute requiring a bell to be rung or a whistle sounded for the protection of travellers at railroad crossings. St. 1906, c. 463, Part II. §§ 245, 147. It was held in Dudley v. Northampton Street Railway, ubi supra, that the St. 1903, c. 473, §§ 1-3, was intended to outlaw unregistered machines, "and to give them, as to persons lawfully using the highways, no other right than that of being exempt from reckless, wanton or wilful injury." It is said that "the Legislature intended to put these forbidden and dangerous machines outside the pale of travellers." There is no doubt that the purpose of the legislation as to signals at railroad crossings was to protect travellers on the ways. The section relates only to signals from the engine when approaching a way or travelled place. Section 245, above referred to, was originally enacted as St. 1871, c. 852, under the title," An Act for the better protection of travellers at railroad crossings." Although the language of the body of the act does not limit the liability to persons using a way as travellers, we

are of opinion that the general purpose of the statute and the language of its title call for a construction that makes it inapplicable to persons upon a crossing for purposes other than travel. This is in accordance with the construction given, in different cases, to the statute requiring the erection of fences along the sides of a railroad. Menut v. Boston & Maine Railroad, 207 Mass. 12. Eames v. Salem & Lowell Railroad, 98 Mass. 560. McDonnell v. Pittsfield & North Adams Railroad, 115 Mass. 564. Darling v. Boston & Albany Railroad, 121 Mass. 118. Under this construction the plaintiffs cannot avail themselves of this statute, for, under the cases above cited, persons riding upon the streets in an unregistered automobile have not the rights of travellers.

If we consider the particular provisions of the statute, we reach the same result. A person cannot have the benefit of the statute if he is acting in violation of law and his unlawful act contributes to the injury. St. 1906, c. 463, Part II. § 245. Hancock, in operating an automobile that was not registered, was acting in violation of law. Neither he nor the others in the automobile, of whose persons he had charge in running the machine, can recover under the statute, if his unlawful act contributed to the injury. Under the early decisions in this Commonwealth, it is too plain for argument that such unlawful conduct would preclude recovery. Under later decisions, the distinction between unlawful conduct which is a cause of an injury and that which is a mere condition of it has been thoroughly established in the law of this Commonwealth. Newcomb v. Boston Protective Department, 146 Mass. 596. Black v. New York, New Haven, & Hartford Railroad, 193 Mass. 448. Farrell v. B. F. Sturtevant Co. 194 Mass. 431, 434. In many other States, in determining whether an unlawful act is a direct and proximate cause of an injury, the tendency of the decisions is towards the establishment of the doctrine that, if there is an unlawful element in an act, which in a broad sense may be said to make the act unlawful, this will not preclude recovery unless the unlawful element or quality of the act contributed to the injury, so that, if the act of a plaintiff may be considered apart from a certain unlawful quality that may enter into it, and if so considered there is nothing in it to preclude recovery, the existence

of the unlawful quality is of no consequence unless in some way it had a tendency to cause the injury. It would not be easy to reconcile all the decisions in this Commonwealth. Some of the later ones, while not attempting to point out exactly the line of distinction, seem to be nearly in harmony with this doctrine, as it is sometimes stated elsewhere.

But if it should be held that a violation of the law as to the use of sleigh bells by a traveller would not preclude him from recovery under this statute, so long as such an unlawful element in his conduct did not contribute to the injury, or in case of a like holding if there was a violation of the law of the road by turning to the left instead of to the right in meeting another team by a traveller, when about to cross a railroad, (see Spofford v. Harlow, 3 Allen, 176; Hall v. Ripley, 119 Mass. 135) it does not follow that plaintiffs can recover in cases like these. in the cases just supposed, it might be held that the unlawful part of the conduct, taken by itself, was not a cause of the injury, and that the act might be considered apart from the unlawful element in it which had no direct connection with the injury, it is not so in the present cases. Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of law and a trespasser. His unlawful act, in walking to that point and thus coming into collision with the engine, would directly contribute to his injury, and would preclude him from recovery.

The judge was right in setting aside the verdicts. The use of the unregistered automobile requires the entry of a judgment for the defendant in each case.

Judgments for the defendant.

W. Thayer & A. T. Smith, (C. W. Bartlett with them,) for the plaintiffs.

R. A. Stewart, (H. J. Hunt with him,) for the defendant.

CHARLES N. NELSON vs. OLD COLONY STREET RAILWAY COMPANY.

Norfolk. January 11, 1911. - March 1, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Practice, Civil, Conduct of trial. Evidence, Relevancy and materiality, Of experiments. Negligence, Street railway.

Where at a trial of an action for personal injuries, conditions of temperature, cloudiness and snow fall at the place of the accident are material issues, and evidence is offered of observations thereof taken at a distance from the accident, it is for the presiding judge to determine whether the observations were so near in time and place and the climatic conditions were sufficiently similar to make the observations admissible as evidence, and the admission of observations taken five miles from the place of the accident and at a place six hundred feet higher is not an improper exercise of discretion.

At the trial of an action against a street railway company for personal injuries received in a collision between a car of the defendant and a wagon of the plaintiff at 6.30 o'clock in the evening of a January 26, there was evidence that "there was a little moonlight, it was not dark and it was not a clear light," and the presiding judge admitted testimony of a civil engineer, called by the defendant, that between 7.80 and 8 o'clock of the same evening, he had stood in the vestibule of a car approaching the place of the collision from the same direction as had the car which ran into the plaintiff, while a man was stationed at the point where the collision had occurred; that "as he came down hill he first caught sight of the man at a point which, on measuring, he found to be one hundred and thirty feet from the point where the man was standing. The car upon which he was riding had both an incandescent and an oil headlight, which assisted him in seeing. At the time this experiment was made he thought the moon was obscured by the clouds." There was evidence that the car which struck the plaintiff was equipped with an incandescent electric headlight. Held, that the admission of the testimony was not clearly erroneous.

At the trial of an action against a street railway company for personal injuries received by the plaintiff by reason of a collision between a car of the defendant and a wagon of the plaintiff, there was evidence tending to show that, at the

time of the collision, the plaintiff was going up a steep hill in the space between the street car rails because the rest of the street was too icy and slippery for travel, and that the motorman of the car had been running his car through the street in question for several years. The plaintiff offered to prove that, owing to the icy condition of the street, teams habitually travelled in the space between the street car rails on the hill in question. The evidence was excluded. Held, that the evidence should have been admitted, since it tended to show a continuous condition, the knowledge of which by the motorman had a direct bearing upon the question of his negligence.

TORT for personal injuries to the plaintiff and damage to his horse and wagon alleged to have been caused by a collision with a street car of the defendant on January 26, 1909, as described in the opinion. Writ dated July 15, 1909.

In the Superior Court the case was tried before Morton, J.

The "observations" as to temperature, cloudiness and snow fall, to the admission of which the plaintiff excepted, were taken at Blue Hill observatory, five miles from the scene of the accident and six hundred feet higher.

The evidence of "experiments," referred to in the opinion, was in the testimony of one Tupper, a civil engineer called by the defendant. It appeared that the accident had occurred at about 6.30 p. m. Tupper testified that between 7.30 and 8 o'clock of the same evening, he had stood in the vestibule of a car coming from the same direction as had the car which ran into the plaintiff, while a man was stationed at the point where the collision had occurred; that "as he came down hill he first caught sight of the man at a point which, on measuring, he found to be one hundred and thirty feet from the point where the man was standing. The car upon which he was riding had both an incandescent and an oil headlight, which assisted him in seeing. At the time this experiment was made he thought the moon was obscured by the clouds." There was evidence that the car which struck the plaintiff was equipped with an incandescent electric headlight.

Other facts are stated in the opinion. The jury found for the defendant; and the plaintiff alleged exceptions.

W. A. Pew, Jr., for the plaintiff.

Asa P. French, for the defendant.

BRALEY, J. The plaintiff's team and the defendant's car, while using the highway in the night time, travelling in opposite directions, approached each other as the team was going up

hill and the car was coming down, when a collision followed causing personal injuries to the plaintiff and damaging his horse and wagon. A verdict having been returned for the defendant, the questions raised by the plaintiff's exceptions relate only to the admission and exclusion of testimony.

The exceptions state that the plaintiff testified, that "there was a little moonlight, it was not dark and it was not a clear light," and that the road in the vicinity was very icy, but between the tracks there was no snow or ice all the way up the hill as far as he could see. It was consequently competent for the defendant to introduce evidence as to the temperature, cloudiness, and the fall of snow which had taken place at the time of the accident. If the observations of the witness, whose accuracy was not disputed, were taken at a point some five miles distant, it was for the presiding judge to decide whether they were so near in time and place, and the climatic conditions were sufficiently similar, as to make his evidence admissible. It cannot be said as matter of law that they were too remote. Ducharme v. Holyoke Street Railway, 208 Mass. 384, 398.

Nor does an exception lie to the admission of certain experiments made by the defendant's surveyor. It is not shown that the judge's decision was clearly erroneous. Baker v. Harrington, 196 Mass. 839.

But a question of more difficulty arises as to the exclusion of evidence offered by the plaintiff to show that owing to the icy condition of the street teams habitually passed over the space between the rails from which the ice and snow had been removed. The jury would have been warranted in finding that the motorman in charge had been running a car through this street for several years, and knew or in the exercise of due diligence should have known, that by reason of accumulated snow and ice on the roadway outside, travel was largely diverted to that portion within the defendant's location, which was the only convenient and safe place where the plaintiff could pass. If in running the car the defendant's motorman was bound to exercise due care not to injure travellers whether they were few or many, yet the standard of requirement depended upon the situation. The diligence to be exercised where little travel is to be anticipated, does not call for the precautions VOL. 208.

as to speed and readiness of control, or the diligence and attention usually demanded, where from experience or observation the motorman knows that because of snow and ice on other portions of the roadway travel has been, or is likely to be transferred to the portion occupied by the track. It is due care under existing conditions which he must exercise, but the conditions are an important, and may be a controlling element as to whether he was careless, or reasonably careful. Fletcher v. Boston & Maine Railroad, 1 Allen, 9, 15. Hilton v. Boston, 171 Mass. 478. Tashjian v. Worcester Consolidated Street Railway, 177 Mass. 75. Chaput v. Haverhill, Georgetown & Danvers Street Railway, 194 Mass. 218, 220. Chadbourne v. Springfield Street Railway, 199 Mass. 574.

Nor was the testimony objectionable as the defendant contends, because it tended to prove a custom. It was not offered for this purpose, but to show a continuous condition, the knowledge of which by the defendant's servant had a direct bearing upon the question of its negligence. Pitcher v. Old Colony Street Railway, 196 Mass. 69. Lyons v. Boston Elevated Railway, 204 Mass. 227.

The evidence having been relevant, its exclusion makes it necessary to sustain the exceptions.

So ordered.

GEORGE U. CROCKER & others vs. JUSTICES OF THE SUPERIOR COURT.

Suffolk. November 17, 1910. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Mandamus. Superior Court. Practice, Criminal, Change of place of trial, Venue.

A judge of the Superior Court made an order denying motions of the defendants in a criminal case in the following words: "I refuse to hear the parties on the several motions of the defendants that the court order a trial of these indictments in some county other than the county of Suffolk believing that I have no jurisdiction to entertain or grant such motions." Held, that this order did not mean that the judge of the Superior Court had considered the subject matter of the motions and ruled as matter of law that that court had no jurisdiction of such motions, in which case the only remedy of the defendants would have been by exception or appeal under R. L. c. 219, §§ 32, 34, 35, but that the order

was a refusal to act at all upon the motions, and therefore that the defendants had a right to resort to the extraordinary remedy of mandamus to compel the justices of the Superior Court to exercise their judicial faculty and either to deny the motions as matter of law or to determine whether they ought to be granted.

The Superior Court as created by St. 1859, c. 196, possessed, as to the subjects within its original jurisdiction, the powers which the Court of Kings Bench, the Court of Common Pleas and the Court of Exchequer had at common law in England in 1699, and such as had become a part of our body of common law before our separation from England, as well as those powers expressly conferred upon it by statute.

It is within the jurisdiction of the Superior Court to order a change of the place of trial of a person charged with a felony from one county to another, when satisfied that a fair and impartial trial cannot be had within the county where the venue is laid in the indictment.

When it is plainly shown that an impartial trial of a person indicted for a crime cannot be had in the county where the venue is laid in the indictment, a record should be made of that fact, and an order should be made transferring the case for trial to another county at a regular sitting of the court there; but the indictment remains unaltered as to venue, and all proceedings upon the indictment except the trial by jury should be in the county where the indictment was found.

The power of the Superior Court to order a change of the place of trial in a criminal case from one county to another is one which should be exercised with great caution and only after a solid foundation of fact has been established showing that the ends of justice require such a change.

RUGG, J. The petitioners were indicted for a felony. Seasonably they presented motions, suggesting that because of "local prejudice and other causes" they could not have an impartial trial in the county of Suffolk, and asking that the proceeding be removed to another county for trial. Thereafter, an order was entered by a judge of the Superior Court,* which as amended was as follows: "I refuse to hear the parties on the several motions of the defendants that the court order a trial of these indictments in some county other than the county of Suffolk, believing that I have no jurisdiction to entertain or to grant such motions." This is a petition for a writ of mandamus to compel the Superior Court to entertain and decide the motions.†

The first question presented is whether mandamus lies in a case of this sort. It becomes necessary to determine the meaning of the indorsement made in the Superior Court upon the

Wait, J.

[†] The case came before Rugg, J., who ordered that the petition be dismissed, and, at the request of the petitioners and with the consent of the respondents, reserved the case for determination by the full court.

motions filed by the defendants there, who are the petitioners here. It is perhaps susceptible of two constructions, one that the court has considered the subject matter, and ruled as matter of law that it has no jurisdiction of such motions, the other that the court has abdicated its province and refused to exercise its judicial function, adding by way of parenthesis that its excuse is a belief that it has no jurisdiction in the premises. Ordinarily we should be loath to adopt the latter construction. language appears to be strongly phrased with an evident intent to convey that thought, and an examination of the papers discloses that, as originally entered, an unequivocal ruling of law was made disposing of the motion. If that had stood as the final action of the Superior Court, the only remedy of the defendants would have been by exception or appeal under R. L. c. 219, §§ 32, 34, 35. But it did not so stand, and the action of that court was changed to a statement of declination even to hear the parties. We are constrained therefore to interpret the order as a refusal to act at all upon the motions.

The writ of mandamus is an extraordinary remedy, and is usually granted only when no other adequate relief can be afforded. It cannot be employed to supersede an appeal or exceptions in ordinary cases, and does not lie to review a final judgment. Proceedings of inferior tribunals within their jurisdiction in the exercise of the power confided in them cannot be revised in this way. It does not lie to correct errors committed in the course of trial, even though there be no remedy by exception or appeal. Selectmen of Gardner v. Templeton Street Railway, 184 Mass. 294, 297. Finlay v. Boston, 196 Mass. 267, 270. McCarthy v. Street Commissioners, 188 Mass. 338. In re Key, 189 U. S. 84.

But one of the ancient offices of this writ was to compel action by lower judicial tribunals respecting matters properly before them and within their jurisdiction. If such courts decline to exercise their judicature or to decide matters pending before them, mandamus has always been regarded as the appropriate means by which to set in motion their jurisdictional power. It lies to compel the performance of whatever appertains to the duty of lower courts, where there has been for any reason a refusal to act. Its agency in cases of this class is confined to setting in motion the judicial activities so that a decision will be reached, but it does not extend to any direction as to what that decision ought to be. Chase v. Blackstone Canal Co. 10 Pick. 244. Rice v. Commissioners of Highways, 13 Pick. 225. Morse, petitioner, 18 Pick. 443. Carpenter v. County Commissioners, 21 Pick. 258. Smith v. Boston, 1 Gray, 72. See also In re Winn, 213 U. S. 458; Parker, petitioner, 131 U. S. 221; Ex parte Harding, 219 U. S. 368, 371; Rex v. Stepney Corp. [1902] 1 K. B. 317, 321.

It was the plain duty of the justices of the Superior Court to consider and exercise their judicial faculty upon the subject matter presented by the motions filed in that court, and either overrule them as matter of law or determine whether they ought to be granted. French v. Jones, 191 Mass. 522. Cheney v. Barker, 198 Mass. 356. As we construe the indorsement of the Superior Court upon the motions to be a mere refusal to act, and not the expression of any opinion or ruling, the provisions of R. L. c. 219, §§ 32, 35, authorizing an aggrieved defendant in a criminal case to appeal from a judgment of the Superior Court founded upon matter of law apparent upon the record and to allege exceptions to an opinion, ruling, direction or judgment upon any question of law, do not apply, and there appears to be no other adequate remedy open to the petitioners except this petition.

The issuance of the writ of mandamus is rarely, if ever, matter of right, and commonly rests in the sound judicial discretion of the court. It becomes necessary to determine whether the Superior Court in fact does have jurisdiction to entertain and decide the motions, for the reason that the writ ought not to issue when it can subserve no useful purpose to the petitioners.

The question to be determined is whether the Superior Court has jurisdiction to order a change of the place of trial from one county to another, if and when satisfied that a fair and impartial trial cannot be had within the county where the venue is laid in the indictment. This inquiry has never before been expressly presented for consideration and determination in this Commonwealth. "But this, so far from affording a reason why it should not be fully examined, rather requires that it should be consid-

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ered with great care and attention, as establishing an important precedent." Washburn v. Phillips, 2 Met. 296, at 297. It is not covered by the terms of any statute, although certain relevant statutes will be referred to hereafter. The decision must rest upon the general common law power of the court. It can be determined only upon consideration of the powers of courts of general jurisdiction at common law and of our own courts in the Colony and Province of Massachusetts Bay and under the Constitution.

It is essential first to examine the powers possessed and exercised by the courts of common law in England before the emigration of those who first settled this Commonwealth and brought with them as a part of their heritage the common law as it existed in England. We resort to a consideration of the common law of England previous to the grant of the Provincial Charter in 1691, because as was said in Commonwealth v. Knowlton, 2 Mass. 530, at 534, 535: "Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. . . . So much, therefore, of the common law of England, as our ancestors brought with them, and of the statutes then in force, amending or altering it, such of the more recent statutes as have been since adopted in practice, —and the ancient usages aforesaid, — may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the Provincial and State Legislatures, and by the provisions of our constitution." This language was quoted with approval in Sackett v. Sackett, 8 Pick. 309, 316. Commonwealth v. Leach, 1 Mass. 59, 61. Phillips v. Blatchford, 137 Mass. 510, 513. This always has been the unquestioned law of the Commonwealth. The system of reporting decisions of the higher courts previous to the main emigration to this country between 1620 and 1640 and before the granting of the second charter in 1691 and up to the Declaration of Independence was not so perfect as now, and, in order to ascertain what was the common law then and before the revolution, it is profitable and permissible to examine decisions of English courts since that date, not as binding authorities but as strongly persuasive of what the common law was, because they are determinations by men of experience and learning who have continued to live in the atmosphere of the home of the common law, seeking to expound its principles under the heavy responsibilities of a judicial office.

It was the common law that the indictment for a crime must be found and tried in the county where it occurred, and ordinarily this principle was applied with great strictness. Nevertheless in an early decision, Farewether's case, Cro. Car. I. 348, decided in 1634, during a discussion as to the place of the trial, the clerk of the crown is reported to have said, "That divers precedents have been of such trials upon indictments in banco without any consent of the parties, and against the will of the prosecutors, and in more remote counties." The first trace of the practice, which we have been able to find, was in 1351 and is referred to in 1 Pike's History of Crime in England, 479, in these words: "An instance in which accused persons were to be tried at the Gaol Delivery of Newgate, because they were too powerful in their own district, appears on the Gaol Delivery Roll, 25 Edward III., Huntingdon, where there is a writ to that effect, directed to the Sheriff of Cambridge." In Sacheverell's case, 10 How. St. Tr. 30, decided in 1684, jurymen were drawn from the county of Kent, although the crime prosecuted occurred in the county of Nottingham. In The King v. County of Nottingham, 2 Lev. 112, decided in 1675, trial was had in a county other than that where the offense was alleged to have In The Queen v. County of Wilts, 6 Mod. been committed. 807, [in 1705] Chief Justice Holt is reported to have said that "for the necessity of an indifferent trial" removal might be had into an adjacent county. To the same effect Sir Samuel Gerard's case, Salk. 670 [1705]. See also French v. Kent, Ld. Raym. 88 [1662]; Earl of Shaftsbury v. Cradock, 1 Vent. 363 [1683]; Anonymous, 1 Vent. 61 [1771]. In Rex v. Cowle, 2 Burr.

834, 859 [in 1759], Lord Mansfield said, "The law is clear and uniform, as far back as it can be traced. . . . So in parts of England itself where an impartial trial cannot be had in the proper county, it shall be tried in the next; as 5 G. I. Rex v. County of the City of Norwich, [1 Stra. 177, decided in 1718] about the county bridge, the trial was in Suffolk." In Rex v. Harris, 3 Burr. 1830 [in 1762], the same eminent judge said by way of dictum at p. 1833, "Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or cannot be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county." In the same case Mr. Justice Wilmot said that when it "plainly appears that a fair and impartial trial cannot be had" he had no doubt of the court's power to grant a removal for trial. In The Queen v. Palmer, 5 El. & Bl. 1024, Lord Campbell in granting a petition for removal to another county on the ground that an impartial trial could not be had in the county where the indictment was laid, in forcible language asserted the jurisdiction of the court to pass upon such a motion. In The Queen v. Conway, 7 Ir. C. L. 507, the question was fully discussed, and all the judges appear to have agreed as to the power of the court, Crampton, J., saying at p. 525: "There is another common law right, equally open to defendants and prosecutors, . . . that where it appears that either party cannot obtain a fair and impartial trial in the proper county, then this court . . . has jurisdiction to take the case out of the proper county, as it is called, and to bring it into an indifferent county. . . . This jurisdiction to change the venue ... has been exercised by this court from a very early period. We have reported cases, where the doctrine is laid down in emphatic language; we have the practice of the court of Queens Bench in England independently, of any practice of our own court. . . . The general jurisdiction of the court, in a proper case, to change the venue from one county to any other, cannot be the subject of doubt."

In The King v. Holden, 5 B. & Ad. 847, Lord Denman said: "I apprehend that the power of changing the place of trial whenever it is necessary for the purpose of securing, as far as possible, a fair investigation, is a part of the jurisdiction of this court; and that that power may be exercised, where it is absolutely necessary, in cases of felony." In The King v. County of Cumberland, 6 T. R. 194, 195 [1795], it was said by Lord Chief Justice Kenyon that it "would be an anomalous case in the law of England" if the Court of Kings Bench did not have power to order a cause removed for trial to a county where a disinterested jury might be had. In Regina v. Barrett, Ir. Rep. 4 C. L. 285, the opinion fully reviews the authorities and concludes that they "show that the jurisdiction to change the place of trial in cases of felony does exist." The power was asserted plainly to exist by two lords chancellors, Lord Cranworth and Lord Campbell, and by the Attorney General and others in debate in the House of Lords. See 140 Hansard's Parliamentary Debates, (8d series) 218, 512, 2194, 2200. Statements of similar import are found in Proctor v. Philips, Hardres [in 1663], 311; Anonymous, Dyer, 279 b; Crouch v. Risden, 1 Vent. 61 (in 1671); Mayor of Bristol v. Procter, 1 Wils. 298. See also Rex v. Clace, 4 Burr. 2456; The King v. Amery, 1 T. R. 863; The Queen v. Fay, Ir. Rep. 6 C. L. 436; The Queen v. Delme, 10 Mod. 199; The King v. Hunt, 3 B. & Ald. 444; Rex v. Ellis, 6 B. & C. 145; The King v. Thomas, 4 M. & S. 442; Regina v. Simpson, 5 Jur. 462; Anonymous, Lofft, 50; Poole v. Bennett, 2 Stra. 874; Anonymous, 12 Mod. 503; The King v. Nottingham, 4 East, 208; The King v. Russell, 4 B. & Ad. 576; The Queen v. Phelan, 14 Cox C. C. 579; Tidd's Practice, 605; Lush's Practice, 409; Short & Mellor's Criminal Offences, 204, 205.

Some of these decisions were made upon a petition for a writ of certiorari from the Court of Kings Bench to a lower court. The form of action, however, does not seem to be material. It is the general recognition of a power of removal for the purpose of securing a fair trial which is important. It is asserted in 1 Chit. Crim. Law, (2d ed.) 201, 371, 494, that it has long been the common law of England that, when an impartial trial cannot be obtained, the Court of Kings Bench has the power of directing the trial to take place in the next adjoining county. We are able to find no dissent from this apparently universal current of authority asserting that the Court of Kings Bench in England possessed the power. This review of authorities demonstrates that in 1699 the Court of Kings Bench in England had and in

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fact exercised the jurisdiction to remove causes from one county to another in order to secure an impartial trial.

It remains to ascertain whether this right of removal for a fair trial was a part of the common law brought over by the forefathers. By the Prov. Laws, 1699, c. 3, § 1 (Acts and Resolves of the Province of Massachusetts Bay, vol. I. p. 371), it was enacted, "That there shall be a superiour court of judicature, court of assize and general goal delivery, over this whole province . . . who shall have cognizance of all pleas, real, personal or mixt, as well all pleas of the crown and all matters relating to the conservation of the peace and punishment of offenders as civil causes or actions between party and party . . . and generally of all other matters, as fully and amply to all intents and purposes whatsoever as the courts of king's bench, common pleas and exchequer within his majesty's kingdom of England have or ought to have." This statute has frequently been referred to as a source of jurisdiction of the courts of this Commonwealth. Savage v. Gulliver, 4 Mass. 172, 174. Commonwealth v. Johnson, 8 Mass. 88. Commonwealth v. Parker, 2 Pick. 550, 555. Washburn v. Phillips, 2 Met. 297. Fuller v. Starbuck, 5 Cush. 493. Attorney General v. Boston, 123 Mass. 460, 471. Connecticut River Railroad v. County Commissioners, 127 Mass. 50, 58. Chapter 1 of the Province Laws of 1699 (Acts and Resolves of the Province of Massachusetts Bay, vol. I. p. 367) established a court of general sessions of the peace to be held by the justices of the peace of each county with a limited criminal jurisdiction but an unlimited right of appeal to the court of assize and general gaol delivery. It is not necessary to inquire, therefore, whether the Superior Court of Judicature had power to remove causes from the court of general sessions by writ of certiorari (see Cook, petitioner, 15 Pick. 234; Commonwealth v. Roby. 12 Pick. 496, 498), for all cases plainly could be brought before it on appeal. As the express terms of the statute conferred upon the Superior Court of Judicature all the jurisdiction possessed by the Court of Kings Bench in England, the right to grant removal to another county, in order that a fair trial might be had, seems to have been given it. It is plain, from the terms of this statute and what appears to have been the undisputed practice in England prior to 1699, that the Superior Court of Judicature possessed this right in 1699. Nothing can be found in the provincial statutes passed between 1699 and 1780 which curtailed or limited the jurisdiction conferred by the act by which the court was constituted.

When the Constitution of Massachusetts was adopted in 1780, c. 6, art. 6, provided that "All the laws which have heretofore been adopted, used and approved, in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." The general body of jurisprudence which had heretofore existed was thus preserved and continued. By St. 1780, c. 17, an act approved February 20, 1781, the jurisdiction of the Supreme Judicial Court was defined to be the same as "By particular laws were made cognizable by the late Superior Court of Judicature, Court of Assize and General Gaol Delivery, unless where the Constitution and Frame of government hath provided otherwise." An examination of statutes passed since respecting the jurisdiction of courts shows that the Legislature has manifested no intention, either expressly or by fair implication, to limit in this respect the powers of the higher courts as established by the Constitution and the legislation passed immediately thereafter. See St. 1782, c. 9. St. 1782, cc. 11 and 14, respectively, establishing a court of common pleas for the trial of civil causes and a court of General Sessions of the Peace for the trial of criminal causes both gave full right of appeal to the Supreme Judicial Court, and no substantial change was made by St. 1803, c. 154, which transferred to the court of common pleas the criminal jurisdiction of the court of General Sessions of the Peace. See also Rev. Sts. cc. 81, 82. When the Superior Court was established by St. 1859, c. 196, section 1 provided that it should "have the same powers and jurisdiction in all actions and proceedings at law, whether civil or criminal, as the Supreme Judicial Court, the Court of Common Pleas, the Superior Court of the county of Suffolk, and the Municipal Court of the City of Boston now have," with exceptions not here material. statute conferred upon the Superior Court powers of general jurisdiction theretofore exercised by the Superior Court of Judicature and by the Supreme Judicial Court. The Superior Court became thereby a court of general criminal jurisdiction impliedly clothed as to matters placed within its original cognizance, with all those inherent attributes which the Supreme Judicial Court would have possessed as to the same matters. Speaking broadly, it possessed, as to the subjects within its original jurisdiction, the powers which courts of Kings Bench, Common Pleas and Exchequer had at common law in England before 1699, and such as had become a part of our body of common law before our separation from England, as well as those expressly conferred upon it by statute.

It is true that there are dicta in early cases to the effect that such power did not exist. In Lincoln County v. Prince, 2 Mass. 544, it was said in a per curiam opinion upon a plea in abatement in an action brought by a county against a citizen of another county where a statute authorized such action in the court of the county of the defendant's domicil, after discussing some other matters not directly involved, that "All these difficulties would be removed by investing this court with power to adjourn any cause, from a county where an impartial trial cannot be had, to an adjoining county, for a trial by disinterested and unexceptionable jurors. This power we do not possess." There was nothing before the court involving this question, however. The force of the decision on the point decided was somewhat limited in Gage v. Gannet, 10 Mass. 176. Hawkes v. Kennebeck, 7 Mass. 461, was also an action against a county which went to the full court only on a plea in abatement as to the teste of the writ, and in an opinion directing the writ to be quashed Chief Justice Parsons in the course of the reasoning said by way of dictum: "If this court had a power, which it has not, of ordering an action commenced in one county to be tried in another, when impartial justice required it," and "that every action must, in this State, be tried in the county in which it is commenced." It is also to be noted that these dicta were spoken concerning causes commenced in the Court of Common Pleas, which was a distinct and separate court established for each county, composed of four judges, all of whom were required by law to be residents of the county for which they were appointed. See St. 1782, c. 11. It may be that as to causes arising in a court of that kind the power of the appellate court was thought to be restricted beyond what it would have been over a cause begun in a court of such general jurisdiction as the Superior Court is. See Hall v. Hall, 200 Mass. 194. The court expressly declined to follow the general reasoning of this opinion, though this particular point was not adverted to in Brown v. Somerset, 11 Mass. 221. The statement in Cleveland v. Welsh, 4 Mass. 591, that "no power was given to the court to change the venue to the county where the cause of action happened" was made as to the power of the Court of Common Pleas of that time, a distinctly county court of somewhat limited jurisdiction, and possessing therefore only those functions expressly or by necessary implication granted to it, and did not refer to removal to another county to secure an impartial trial.

These are the only cases in this Commonwealth in which there is any reference to the subject. While dicta even of such a character are entitled to respect, they are not of binding authority, and uttered as these were without any apparent investigation respecting a question involving considerable historical research which fortunately has rarely arisen here, they are not to be regarded as of controlling significance.

Special Provincial laws were passed making provision for a change in the usual course of trial in particular cases, 1712-1713, c. 7 (1 Prov. Laws, 701) setting forth in its preamble a complaint by "divers Indian sachems" on Nantucket that they could not secure fair trials in the usual courts. St. 1744-1745, c. 8 (3 Prov. Laws, 156). Jonathan Belcher, who had been Governor of the Province from 1730 to 1741, petitioned that a cause in which he was interested pending in Bristol County might be removed to another county because of local interest, but the Legislature directed the summoning of jurors from the county of Suffolk to attend at Taunton in the county of Bristol. 1747-1748, cc. 138, 278; 1749-1750, c. 358; 1750-1751, cc. 7, 91 (14 Prov. Laws, 55, 111, 402, 411, 445). Similar action was taken in behalf of Ebenezer Salisbury, who had an action pending as to the same subject matter as Governor Belcher. Res. 1750-1751, c. 298 (14 Prov. Laws, 525). See also Joseph Buckminster's case, Res. 1742-1748 (13 Prov. Laws, 142), and that of Timothy Prout, Res. 1752-1753, c. 47 (14 Prov. Laws, 648).

Numerous other statutes have been referred to by the learned

district attorney, in his very exhaustive and helpful brief, providing for trial in other counties than that laid in the indictment, because of the desirability of an earlier trial than otherwise could have been had, or for some reason other than that an impartial trial could not be had. All these Provincial statutes are of little consequence in this connection for the reason that the Province was small and the legislative body exercised a broad power except as controlled by the authority of the king and his representative in the royal governor. It was in some respects more easy of access than the Superior Court of Judicature because it was more often in session and the court had little power in vacation, and in some counties met but once a year, while the Legislature met twice a year or oftener. Hence it was natural to apply directly to it in unusual cases rather than await a regular sitting of the court.

Since the adoption of the Constitution, several statutes have been passed enlarging the venue of actions, in order to secure trials before indifferent jurors in actions for the most part though not exclusively to which the counties, the city of Boston (which constitutes by far the larger part of Suffolk County in population, wealth and area), the town of Nantucket, the towns of Dukes County and the Commonwealth are parties. Sts. 1810. c. 127; 1866, c. 233; 1879, c. 255; 1877, c. 234, § 5; 1808, c. 19; 1816, c. 103; 1828, c. 13; 1885, c. 384, § 14. R. L. c. 167, §§ 4-6, 8, 9. Sts. 1904, c. 320; 1910, c. 63. Other statutes have permitted or directed trials of causes arising in one county to take place in another. St. 1871, c. 240, § 1, authorized a change in capital cases upon the petition of the defendant whenever in the opinion of the court an impartial trial could not be had in the county where the cause was pending. R. L. c. 157, §§ 12-15. St. 1887, c. 347, gave similar power to the Supreme Judicial and Superior Courts in all civil causes to be exercised upon application of either party. R. L. c. 167, § 12. Thus by express enactment the Legislature had conferred the power upon the higher courts as to all causes except crimes less than capital. In the light of the history of our common law and the jurisdiction of our courts, we are of opinion that these statutes, so far as they empower a transfer in order to secure an impartial trial, are but declaratory of the common law and confer no new power. A

careful examination will show that statutes not infrequently have been enacted which only declare the common law. For example, Ellis v. Brockton Publishing Co. 198 Mass. 538. These statutes and this principle for securing an impartial trial in exceptional cases are in no way at variance with the general proposition of art. 13 of the Declaration of Rights as to the importance of the verification of facts in the vicinity where they happen.

The weight of opinion in those of the older States, whose judicial history is most nearly like our own, supports the view that it is an inherent power of common law courts to order a change for the purpose of securing an impartial trial. Cochecho Railroad v. Farrington, 26 N. H. 428 at 436, held that the power of the courts of England to transfer the trial of transitory actions "became thoroughly engrafted upon the common law, long before the independence of this country; and from that time forth, not only has the practice prevailed in the courts of England, but the power is now exercised by the courts of very many if not all of our States, either by force of express statute or the adoption of the common law into the jurisprudence of the same." State v. Albee, 61 N. H. 423, involved the precise question here presented. arose under a constitution which provided that "In criminal prosecutions, the trial of facts in the vicinity where they happen is so essential to the security of the life, liberty, and estate of the citizen, that no crime or offense ought to be tried in any other county than that in which it is committed, except in cases of general insurrection in any particular county, when it shall appear to the judges of the Superior Court that an impartial trial cannot be had in the county where the offense may be committed, and, upon the report, the Legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained." By act of 1692 the Superior Court of New Hampshire was given the jurisdiction of the English Court of Kings Bench. Yet notwithstanding the language of the Constitution, it was held that the court possessed common law power to change the place of trial of a criminal cause in order to secure an impartial trial in the absence of any statute, it being said in the opinion: "Occasions sometimes occur when from a combination of circumstances popular prejudices are aroused, and bitterness of feeling fills the popular mind. Jurors, because they

are human, may be swayed by an unjust public sentiment, and may be influenced by public prejudices. It is not reasonable to suppose that the convention that formed the constitution of 1784 understood that such a state of popular feeling could only arise during a time of general insurrection, or intended that an accused citizen should be subjected to the expense, delay, and annoyance of procuring the legislative sanction to a change of venue, and that only after a report of the judges of the Superior Court, Men who had enjoyed this protection under the British crown would not be likely to surrender it after engaging in an exhaustive war for seven years to establish their independence. One of their grievances was the trampling under foot of the time-honored principle that trials for crime must be by a jury of the vicinage." This case overrules whatever may be inconsistent with it in the earlier case of State v. Sawyer, 56 N. H. 175, which was a per curiam opinion.

In Commonwealth v. Balph, 111 Penn. St. 365, where the same question in principle was under consideration, it was held that the court had power to transfer a cause to secure an impartial trial, and after citing some of the English cases to which we have referred it was said: "This is the settled law of England, and in this country, in those States in which the Supreme Court is clothed with Kings Bench powers the same rule prevails." To the same effect see Commonwealth v. Delamater, 145 Penn. St. 210; Commonwealth v. Smith, 185 Penn. St. 558, 565; Quay's petition, 189 Penn. St. 517, 540, 541; Commonwealth v. Ronemus, 205 Penn. St. 420, 424. In Negro Jerry v. Townshend, 2 Md. 274, at 278, it was said: "All laws for the removal of causes from one vicinage to another, were passed for the purpose of promoting the ends of justice, by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common law right belonging to our courts, and as such can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments." Price v. State, 8 Gill, 295, 310 et seq.

It was held in *People* v. *Peterson*, 93 Mich. 27, 28, 31, that, although there was a statute dealing with the subject, the statute was "but declaratory of the common law power vested in

the Circuit Courts of this State." This was followed in *People* v. *Fuhrmann*, 103 Mich. 598, 595, and *Glazier* v. *Ingham Circuit Judge*, 153 Mich. 481, 485. These cases must be regarded as overruling whatever there is to the contrary in *Shannon* v. *Smith*, 31 Mich. 451.

The same view is held in New York, where in Jones v. People, 79 N. Y. 45, 49, it was said that the power was inherited from the English Court of Kings Bench. People v. McLaughlin, 150 N. Y. 365, 875. People v. Vermilyea, 7 Cowen, 108, 130, 139. People v. Webb, 1 Hill, 179, 182. People v. Bodine, 7 Hill, 147. People v. Jackson, 114 App. Div. (N. Y.) 697. The same rule prevails in Minnesota, where it was said that a statute to that effect was merely declaratory of the common law. State v. Miller, 15 Minn. 344, 849. In a well considered opinion reviewing somewhat the authorities, the same conclusion was reached in Barry v. Traux, 13 No. Dak. 131, 137-148.

In Kendrick v. State, Cooke, (Tenn.) 474, and Bob v. State, 2 Yerg. 178, 183, it was held that a removal should be granted under common law powers where a cause was made out that "because of the public clamor, justice could not, in all likelihood be done the person charged in the county where charged." It may be inferred from Weakley v. Pearce, 5 Heisk. 401, 414–423, arising after the adoption of a new constitution in Tennessee, that these older cases do not declare the present practice in that State, probably on the ground that the whole subject has been covered and minutely regulated by statute. See also Exparte Williams, 4 Yerg. 579.

There are authorities collected in a footnote * which seem to

^{*} Adams v. People, 12 Ill. App. 380, 382. Millison v. Holmes, 1 Ind. 45, 46. State v. Smith, 55 Ind. 385, 386. Weakley v. Wolf, 148 Ind. 208, 219-221. In re Griffin, 33 Ind. App. 153, 154. In re Darrow, 83 N. E. Rep. (Ind.) 1026. Meunch v. Breitenbach, 41 Iowa, 527, 529. Zelle v. McHenry, 51 Iowa, 572, 575. Lightfoot v. Commonwealth, 80 Ky. 516, 523. Byram v. Holliday, 84 Ky. 18, 21, 22. Powers v. Mitchell, 75 Maine, 864, 369. Wilson v. Rodewald, 49 Miss. 506, 511, 512. Wessinger v. Mausur & Tibbetts Improvement Co. 75 Miss. 64, 71. Wilkerson v. Jenkins, 77 Miss. 603, 606. State v. Sanders, 106 Mo. 188, 194. State v. Wofford, 119 Mo. 408, 410. State v. Dyer, 189 Mo. 199, 209. State v. Lanahan, 144 Mo. 31, 38. State v. Headrick, 149 Mo. 396, 403. Raming v. Metropolitan Street Railway, 157 Mo. 477, 487. State v. Barrington, 198 Mo. 23, 84. State v. McGehan, 27 Ohio St. 280, 284. Stanley v. United States, 1 Okl. 386, 840-342. Commercial National Bank v. Davidson, 18 Orevol., 208.

have a contrary appearance. It is not necessary to examine them Most of them are to be distinguished as arising under constitutions which have some controlling provision, or under statutes or codes which cover the whole subject matter of change of place of trial in great detail and leave nothing to be governed by the common law. Doyle v. Kirby, 184 Mass. 409, 411. Attorney General v. New York, New Haven, & Hartford Railroad, 197 Mass. 194, and cases cited. Almost without exception also they are by courts whose history does not extend through a Provincial and Colonial period, and whose jurisdiction is not the inheritance of so close a connection by statutory reference and by the adoption and growth of custom to the court of England as in this Commonwealth. It is perhaps true of the newer States that the powers of courts even of general jurisdiction are more technically dependent upon the terms of statutes than in States where the development of jurisdiction has been more slow and wrought in part only by detailed enactments and in part by reference to the powers of the common law courts of England. Moreover, no one of them discusses the question fully and comprehensively in its broader aspects. For these reasons we do not regard these decisions as persuasive authority.

This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the Kings Bench before our revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.

If the matter is considered on principle and apart from authority, the same conclusion is reached. It is inconceivable that the people who had inherited the deeply cherished and hardly won principles of English liberty and who depleted their resources in a long and bloody war to maintain their rights as freemen, should have intended to deprive their courts of the power to secure to every citizen an impartial trial before an unprejudiced tribunal. The people of the Commonwealth solemnly avowed in their Declaration of Rights, art. 29, that "It

^{57, 65, 66.} Commonwealth v. Rolls, 2 Va. Cas. 68. Commonwealth v. Wildy, 2 Va. Cas. 69. Heath v. Mathiew, 19 Wis. 114, 116. Boldt v. State, 72 Wis. 7, 11. Hanley v. State, 125 Wis. 396, 400. State v. Howard, 31 Vt. 414. Cotton v. State, 32 Texas, 614, 636-640. Johnson v. State, 31 Tex. Cr. 456, 461.

is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. Without such a power it might become impossible to do justice either to the general public or to the individual defendant. Our system of government has created the executive, the legislative and the judicial, as three independent and co-ordinate departments, and in strong and comprehensive language has prohibited each from attempting to exercise the functions of either of the others "to the end that it may be a government of laws and not of men." The courts of general jurisdiction under such a Constitution have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake. The possession of such power involves its exercise as a duty whenever public or private interests require.

The purpose for which courts are established is to do justice. A fundamental principle of free institutions was stated by Hamilton in these words: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger." (The Federalist, ed. 1864, No. 51, p. 401.) Where questions of fact are to be settled as in all criminal prosecutions for felony, and in a large number of other causes, a jury is the instrumentality provided by the law for determining those facts. Government itself fails if a jury of just men with minds open only to the truth as shown by the evidence cannot be provided.

Considerations based upon historical research, authority and sound principle lead to the conclusion that it was within the jurisdiction of the Superior Court to consider and grant the motions filed by the several petitioners here, defendants in that court, if upon investigation it was found that a trial before an indifferent jury could not be had in Suffolk County. Such a motion is not technically for a change of venue, but only for a change as to the place of trial by jury. Where a plain case is made out, a record should be made that an impartial trial cannot be had in the county where the indictment is laid, and the cause ordered transferred for trial to another county at a regular sitting of the court there. The indictment remains unaltered as to venue, and all other proceedings upon it except the trial by jury should be in the county where the indictment is found.

That this question never has been presented for determination before is strong proof that there has been no occasion for the exercise of that power. Such a motion ought not to be granted upon mere suggestion, nor unless the reason for it is fully established. It is a jurisdiction which should be exercised with great caution and only after a solid foundation of fact has been first established. Manifestly it should be resorted to only in aid of justice, and it should not be permitted to be employed as an instrument of obstruction or as a means of delay. But if the Superior Court is convinced that a fair trial cannot be had in any county where an indictment is found, it has the right and ought to order the cause removed to such near by county as will furnish a jury which would be impartial.

Writ to issue.

- C. F. Choate, Jr., (H. F. Hurlburt with him,) for the petitioners.
- J. C. Pelletier, District Attorney, for the respondents, submitted a brief.

BARTHOLOMEW DONOVAN vs. DANIEL BERNHARD.

Suffolk. January 12, 1911. - March 2, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Negligence, In use of highway, Due care of plaintiff.

- A traveller on foot, who is passing over a crosswalk near the junction of two city streets, where the conditions are not such as to call for unusual care, is not necessarily negligent in failing to look and listen for approaching horses and wagons.
- If a traveller on foot, when passing over a crosswalk near the junction of two city streets, sees an electric car approaching at his right hand and there is nothing so near on his left hand as to require him to take precautions against it, and while thus proceeding he is run over by a horse which is being driven rapidly from the left hand side by an inattentive driver, in an action by the traveller against the employer of the driver for the injuries thus caused, the question of the due care of the plaintiff is for the jury.

Knowlton, C. J. This is an action to recover damages for being struck and run over by a horse and wagon, while the plaintiff was passing over a crosswalk on Tremont Street, at a point near its junction with Huntington Avenue in Boston. The plaintiff's exception is to an order of the presiding judge * that a verdict be returned for the defendant. There was evidence tending to show that the defendant's servant, the driver of the horse, was guilty of negligence. The jury might have found that the horse was being driven rapidly, and that the driver was inattentive to his duty.

The question principally discussed at the argument was whether there was evidence that the plaintiff was in the exercise of due care. The law of the case is stated in Murphy v. Armstrong Transfer Co. 167 Mass. 199, as follows: "It has repeatedly been held that the mere failure of a pedestrian to look and listen for approaching teams, as he passes over a crosswalk at the junction of two streets, is not necessarily such negligence as will prevent recovery if he is run over by a passing team." Some of the cases that state this doctrine are Schienfeldt v. Norris, 115 Mass. 17, Carland v. Young, 119 Mass. 150, Bowser v. Wellington, 126 Mass. 891, Shapleigh v. Wyman, 184 Mass. 118,

[.] White, J.

Dorr v. Schenck, 187 Mass. 542, Hennessey v. Taylor, 189 Mass. 583, Robbins v. Springfield Street Railway, 165 Mass. 30, McDonald v. Bowditch, 201 Mass. 339. Upon the evidence in this case an application of this doctrine entitles the plaintiff to go to the jury. A traveller on a way has a right to presume that those using it will exercise a proper degree of care. While he must use proper care himself, he may trust something to this presumption.

The cases in which it has been held that a plaintiff, who was injured while crossing a street without observing or avoiding an approaching team, showed no evidence of due care, have been for the most part where, from the crowded condition of the streets, or the running of electric cars, or other causes, special care was necessary. Most of them have been actions against street railways, where the risk from an approaching car is ordinarily much greater than that from a horse and carriage. In many of them the plaintiff knew facts or saw objects which put upon him a special duty to take some precaution which he neglected. See Blackwell v. Old Colony Street Railway, 198 Mass. 222; Holian v. Boston Elevated Railway, 194 Mass. 74; Fitzgerald v. Boston Elevated Railway, 197 Mass. 440; Russo v. Charles S. Brown Co. 198 Mass. 473; Smith v. Boston Elevated Railway, 202 Mass. 489.

In the present case, while the plaintiff looked out and saw a car approaching in the street at his right hand, there is nothing to show that there was anything on his left of such appearance, or so near him, as to make it negligence, as a matter of law, for him to fail to take precautions against it.

Exceptions sustained.

C. W. Bond, for the plaintiff.

R. Spring, for the defendant.

LILLIAN A. CHICK vs. GILCHBIST COMPANY.

Suffolk. January 12, 1911. - March 2, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence. Nuisance. Evidence, Opinion: experts. Practice, Civil, Exceptions.

In an action by a woman against a corporation maintaining a large department store, for personal injuries caused by the plaintiff's heel slipping from the narrow part of a step of a staircase at a point where three steps radiated from a post to make a turn in the staircase, by which the plaintiff was descending from the second floor to the first floor of the building, where it appeared that the stairs were lighted by a large arc electric light, it was held, that the maintenance o such a staircase, well lighted, was no evidence of negligence, the winding of the stairs in this manner being an ordinary method of construction well known and in common use in stores and office buildings.

At the trial of an action by a woman against a corporation maintaining a large department store, for personal injuries caused by the plaintiff's heel slipping on the narrow part of a step of a staircase where the stairs wound around a post to make a turn, the plaintiff cannot be allowed to show by an expert, after having shown the architectural features of the staircase and the conditions under which it was used, that such stairs under such conditions "were not regarded as safe."

At the trial of an action for personal injuries alleged to have been caused by the defendant's negligence, where there is no evidence of negligence on the part of the defendant, the exclusion of evidence, which, if admissible at all, had a bearing only upon the due care of the plaintiff, does not injure the plaintiff and gives him no ground for exception.

TORT for personal injuries alleged to have been sustained by the plaintiff on April 20, 1907, through the negligence of the defendant. Writ dated July 17, 1907.

At the trial in the Superior Court before *Harris*, J., it appeared that the defendant was a corporation, that it conducted a large dry goods store in Boston at the corner of Washington Street and Winter Street, occupying several floors; and that thousands of persons thronged there daily.

The plaintiff testified that in the middle of the day she went to the store as a customer, entered on the first floor and went up in the elevator to the second floor, and that, after attending to her wants on the second floor, she returned to the elevator to descend and found it full and was shown by an employee in the store a stairway which led from the second floor to the first floor.

From the second floor to the first platform of the flight of stairs were fourteen steps with seven inch risers and ten inch treads with a nose on each tread of one and one quarter inches. The first platform was about eight feet long and the full width of the stairs was five feet and three eighths inches in the clear. Descending from the platform were two steps similar to the fourteen and then there was a turn of a quarter of a circle which was made by three steps called winders, radiating from a post, the three steps coming to a point at the post and filling the quarter circle at about the same width as that of the other stairs. The step from which the plaintiff fell, being the first winder, varied from a point at the post to a width of two feet and eight inches, five feet and three eighths of an inch from the post. After the three winders came three steps leading down to another platform and from that platform down to the floor of the store were four more steps similar to the fourteen previously described. There was a hand rail down the left hand side of the stairs, and about one foot from the corner was a brass railing about two inches in diameter. At the left of the lower platform of the steps near the ceiling was a large are electric light, which the plaintiff said that she looked at just an instant before the time of the accident and that it was rattling and flickering. At a point about two feet from the ceiling and about ten inches in front of a perpendicular drop from the ceiling to the first winder was a pasteboard sign about two and a half feet long and eight inches wide on which was written "Keep to the right." People on the stairway were coming up on what was the right hand side of the plaintiff and as she descended she went down on the left hand side. She came down to the first landing and looked at the stairs as she was about to descend and they appeared to her all right and she started down holding on to the brass rail. After taking one or two steps down she put her left foot out to step upon the step and found that only her heel was supported; that she fell, still holding on to the hand rail, went down to the next platform and from there to the floor.

The plaintiff offered to show, as bearing upon the question of her due care, that the brilliant light in its position dazzled her eyes and that consequently the stairs, which she was looking at at the time, failed to show the narrow part where she fell. The judge excluded the evidence, and the plaintiff excepted. This evidence also was offered as showing one of the conditions immediately surrounding the stairway which rendered the place dangerous.

The plaintiff further offered to show by expert testimony that stairs, such as were found there and under conditions such as were found there, were not regarded as safe in a store where large throngs of people constantly were going up and down. The judge refused to admit the opinions of the expert and limited him to describing the architectural features and the conditions. To this the plaintiff excepted.

At the close of the evidence the judge ruled that the plaintiff had shown no negligence on the part of the defendant, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

H. C. Long, for the plaintiff.

J. A. Lowell, (J. Lowell with him,) for the defendant.

SHELDON, J. We find nothing in the evidence which could warrant a finding of any fault or negligence in the defendant. The staircase was of ordinary construction, winding in a manner which is well known and in common use in stores and office buildings. It was not in any respect out of repair. The steps were of proper kind and form. That the place was well lighted did not show any negligence; it might have tended to show negligence if it had not been. Marwedel v. Cook, 154 Mass. 235. The brass railing was an additional precaution for safety. The case resembles McIntire v. White, 171 Mass. 170.

The expert testimony that such stairs under such conditions "were not regarded as safe" was clearly incompetent. The testimony that the plaintiff's eyes were dazzled by the light and that therefore she failed to see the narrow part of the tread on which she fell had no tendency to show negligence in the defendant. Its utmost effect would be to indicate due care or the absence of negligence on her part; and that is not the point on which she fails. She was not aggrieved by the exclusion of this testimony.

The verdict for the defendant was rightly ordered.

Exceptions overruled.

JOSEPH SMITH vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 12, 1911. — March 2, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Practice, Civil, Conduct of trial. Wilness, Cross-examination.

Upon the cross-examination of the plaintiff in an action against a corporation for personal injuries, as in other cases, it is within the discretion of the presiding judge to determine how far he will permit the same questions to be repeated in the same or different forms or whether he will allow or will refuse to allow the previous questions and answers of the witness to be read over by the stenographer, and generally it is within his discretion to restrict within reasonable limits the length and extent of the cross-examination.

In an action of tort for personal injuries, where there is a difference in the contentions of the respective counsel as to what a certain witness said, it is right for the presiding judge to instruct the jury that they must determine for themselves what the testimony was.

TORT for personal injuries alleged to have been sustained by the plaintiff on June 17, 1907, by reason of the sudden starting of an open electric street car of the defendant when the plaintiff was in the act of boarding it as a passenger on Hanover Street near the corner of Battery Street in Boston. Writ dated August 14, 1907.

In the Superior Court the case was tried before Bond, J. There was evidence in behalf of the plaintiff tending to show that the plaintiff was in the exercise of due care and that the conductor of the defendant was negligent in ringing two bells and causing the car to start suddenly after it had come to a stop for the purpose of taking on passengers and when the plaintiff was in the act of getting upon the car and had put one foot on the running board. In behalf of the defendant there was evidence tending to show that the plaintiff was injured solely by reason of his own negligence in attempting to get upon the car while it was moving. The jury returned a verdict for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions relating solely to the conduct of the trial by the judge, as stated in the opinion.

A portion of the judge's charge, referred to in the opinion as correct, was as follows: "It is suggested that I say this to you, as to what the witness said; the answers of the witness to any questions and to all questions are matters solely for the jury. If

you did not hear what was said, some of you may have heard, and you can learn in that way what the others heard. Expressions by counsel as to what a person said, if they help you to remember, are of some use to you, but you do not take the statement of counsel, you do not take the statement of the court, as to what the testimony was if it does not help you to remember that it was the testimony. You take your own recollection, helped by counsel or in any other way, and act upon your own recollection of the testimony."

The case was submitted on briefs.

- F. Ranney & W. E. Monk, for the defendant.
- D. H. Coakley & R. H. Sherman, for the plaintiff.

SHELDON, J. The language of the judge during the cross-examination of the plaintiff gave the defendant no right of exception, It was within the discretion of the judge to determine how far he should permit the same questions to be repeated in the same or different forms, to allow or refuse to allow the previous questions or answers to be read over by the stenographer, and to restrict within reasonable limits the length and extent of crossexamination. We cannot say that he erred in either of these respects. Commonwealth v. Nickerson, 5 Allen, 518. Rand v. Newton, 6 Allen, 88. Demerritt v. Randall, 116 Mass. 831. Jennings v. Rooney, 183 Mass. 577, 579. Commonwealth v. Coughlin, 182 Mass. 558, 564. Squier v. Barnes, 193 Mass. 21, 25. Partelow v. Newton & Boston Street Railway, 196 Mass. 24, 32. This case does not resemble De Forge v. New York, New Haven, & Hartford Railroad, 178 Mass. 59, 64, and Powers v. Bergman, 197 Mass. 89, relied on by the defendant.

Nor can the exceptions to what was said to the jury be sustained. The whole case was left to the jury; and there is no contention that there was any error in the instructions (as there was in Gardner v. Boston Elevated Railway, 204 Mass. 218, and Allen v. Kidd, 197 Mass. 256) as to the plaintiff's right to recover or as to the measure of damages. They were told to determine for themselves what the testimony was. This was correct. Commonwealth v. Walsh, 162 Mass. 242. Whitney v. Wellesley & Boston Street Railway, 197 Mass. 495. Plummer v. Boston Elevated Railway, 198 Mass. 499, 514.

Exceptions overruled.

ELIZABETH BLACKIE & another, executors, vs. CITY OF BOSTON.

Suffolk. January 12, 1911. — March 2, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Tax, Assessment. Executor and Administrator, Taxation of property in the hands of.

R. L. c. 12, § 50, re-enacted in St. 1909, c. 490, Part I. § 49, is as follows: "After personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors . . ." Held, that there is nothing in this statute to prevent an assessment for a larger amount than that last assessed upon the property, if the executor, administrator or trustee has such larger amount in his possession.

CONTRACT, by the executors of the will of John Blackie, for \$4,990.68 paid to the defendant under protest as taxes assessed to the plaintiffs as such executors for the year 1909. Writ dated December 27, 1909.

In the Superior Court the case was submitted to *Hardy*, J., upon an agreed statement of facts, containing the facts which are stated in the opinion. The judge found for the defendant and ordered judgment accordingly. From the judgment entered pursuant to this order the plaintiffs appealed.

G. F. Piper, for the plaintiffs.

K. Adams, for the defendant.

Knowlton, C. J. This case calls for a construction of the R. L. c. 12, § 50, which is re-enacted in the St. 1909, c. 490, Part I. § 49, and is as follows: "After personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors. . . ."

The plaintiffs are the executors of the will of John Blackie, who died in Boston in December, 1907. As such executors, they never have brought in to the assessors a list of the property in their hands belonging to his estate. Under the R. L. c. 12, § 47, it was the duty of the assessors, in the absence of such a

list, to "ascertain as nearly as possible the particulars of the personal estate," . . . and to "estimate its just value according to their best information and belief," Acting under this section, they assessed the plaintiffs for the year 1908 upon personal estate at a valuation of \$100,000. In December, 1908, the plaintiffs filed in the Probate Court an inventory showing personal property of the deceased in their hands to the amount of \$309,156.67 in taxable securities. Thereupon the assessors, acting under the R. L. c. 12, § 85, relative to omitted assessments, assessed them for that year upon personal property to the amount of \$50,000 in addition to the amount previously taxed, making their entire assessment for that year cover personal estate of the value of \$150,000. In the year 1909, no list having been brought in, the assessors taxed them upon personal property of the value of \$300,000. The value of the estate then in their hands was substantially the same as shown by the inventory, namely, \$309,156.67 in taxable securities.

The plaintiffs contend that, under the section quoted above, the plaintiffs could never be taxed for an amount greater than that for which they were taxed in the year 1908, even though the assessors, estimating only upon such information as they could obtain, assessed them in that year upon less than half their taxable property.

The statute does not warrant this construction. By the terms of the section, executors are assessable in a case of this kind for "an amount not less than that last assessed" as in their hands. There is nothing to prevent an assessment for a larger amount if they have a larger amount in their possession. This provision is for the convenience and protection of assessors, and for the interest of the general taxpayers, so that the tax can safely be assessed upon the former amount, if the executors fail to perform their duty to bring in a list. If they have distributed the property, or any part of it, they can protect themselves and the estate by bringing in a list as required by the R. L. c. 12, § 41, or by showing a distribution under the R. L. c. 12, § 23, cl. 7, which sections with slight changes are re-enacted in St. 1909, c. 490, Part I. §§ 41, 23, cl. 7.

It is the policy of our law to make assessments upon all property not specially exempt from taxation. R. L. c. 12, §§ 23, 47.

It would defeat the purpose of the law if the plaintiffs, by failing to bring in a list and leaving the assessors to ascertain and estimate from imperfect information, could hold the assessors bound for future years by their first erroneous valuation. The quoted section is given full effect by treating it only as a limitation, preventing a taxation for a less amount until a true list is brought in as required by law.

The dictum in Vaughan v. Street Commissioners, 154 Mass. 143, 147, was outside of the questions involved in the decision, and is not to be treated as an adjudication of the court.

Judgment for the defendant.

FRANCES A. KERR vs. INHABITANTS OF BROOKLINE.

Norfolk. January 18, 1911. - March 2, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Municipal Corporations. Nuisance. Way, Public: defect. Fireworks.

- A town, which, exclusively for the gratuitous amusement of the public, undertakes the celebration of the fourth day of July under the authority of R. L. c. 25 as amended by St. 1908, c. 91, providing that a town may appropriate money for that purpose, is not liable in an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks from a public playground in conducting the celebration.
- If a town undertakes exclusively for the gratuitous amusement of the public a celebration of the fourth day of July under the authority of R. L. c. 25 as amended by St. 1908, c. 91, providing that a town may appropriate money for that purpose, and its servants negligently discharge fireworks upon a public playground, the town cannot be said to be maintaining a nuisance so as to be liable to one injured because of such acts of its servants.

The setting off, by a town in conducting a celebration of the fourth day of July, of fireworks from a highway or across a highway is not a defect or want of repair in the way.

Knowlton, C. J. This case comes before us on the plaintiff's appeal from an order * sustaining a demurrer to her amended declaration and an order of judgment for the defendant. The amended declaration contains numerous counts, which set forth in different ways her claim against the town for an injury

^{*} By Pierce, J.

received from being struck by a rocket which was fired from a public playground as a part of the celebration of the fourth day of July. In most of its features the case is like Tindley v. Salem, 137 Mass. 171, and is covered by it. The giving of the display of fireworks by the town was under the same statutory authority as was considered in the case cited. The fact that the place where the rocket was set off was a public playground, instead of a public square of a city, does not affect the question of legal liability. The reason of the decision was that the work in which the city was engaged was conducted solely in the public interest and for the general benefit. The case was therefore held to be governed by Hill v. Boston, 122 Mass. 844. A reason lying deeper still is that a city can act only by officers, agents or servants. If there is negligence in the management of the business or in doing the work, it is that of the person or persons who represent the city. While it is reasonable that these individuals should be held liable for their negligence to any one injured by it, (see Moynihan v. Todd, 188 Mass. 301,) it is not thought to be reasonable that a municipality or a public officer, who is engaged upon a public work conducted for the benefit of the people and not for gain, should be held liable for the negligence of his servants or agents under the doctrine respondent superior. The principle has been applied and discussed in other cases. Moynihan v. Todd, ubi supra. Howard v. Worcester, 158 Mass. 426. Harrington v. Worcester, 186 Mass. 594. Lincoln v. Boston, 148 Mass. 578. The principles enunciated in these decisions entirely cover the present case in every aspect of it that involves alleged negligence at common law.

The plaintiff contends that she can recover as for the maintenance of a nuisance. It is strongly intimated in Lincoln v. Boston, 148 Mass. 578, 580, that a landowner is not "liable for a transitory act of a third person, the scope of which cannot be enlarged by calling it a public nuisance, and which has in it no element of continuing use of the real estate." In the present case the town is not the owner of the playground in any ordinary sense. The property is held under the statute, solely for a public use. R. L. c. 28, § 19. St. 1910, c. 508. Then, too, the setting off of fire works on a single occasion does not create any permanent or continuing condition of the real estate, such

as creates a liability against a landowner, or a city or town in control of lands, in such cases as Anthony v. Adams, 1 Met. 284, 285, Lawrence v. Fairhaven, 5 Gray, 110, Perry v. Worcester, 6 Gray, 544, Parker v. Lowell, 11 Gray, 853, and Wheeler v. Worcester, 10 Allen, 591. The attempt to hold the town under the law of nuisance fails, because the case involves no elements of alleged wrong except ordinary negligence.

The plaintiff also seeks to hold the defendant under the statute in regard to defects in highways. The sending up of a rocket from a highway or across a highway is not a defect or want of repair in the way.

The case is somewhat like Barber v. Roxbury, 11 Allen, 818, in which it was held that a rope in a highway, drawn up by human agency, did not constitute a defect, although that case was much stronger for the plaintiff than the present one. In Pratt v. Weymouth, 147 Mass. 245, 252, it was held that a derrick standing in a highway, that fell on the plaintiff as he was passing, was not a defect in the way for which the town was liable. It has often been held that objects or sounds outside of a way, that frighten horses as they pass, are not defects in the way. We think it plain that the present case is not within the statute creating a liability for defects in ways.

In every aspect of the case the only ground of liability is the alleged negligence of the person or persons representing the town, and for this the town is not liable.

Judgment affirmed.

E. M. Brooks, for the plaintiff.

C. A. Williams, for the defendant.

CATHEBINE C. WHITE vs. BOSTON ELEVATED RAILWAY COMPANY.

PETER J. WHITE vs. SAME.

Suffolk. January 13, 1911. — March 2, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Evidence, Declarations of deceased persons.

At the trial of an action against a street railway company for personal injuries alleged to have been received by the plaintiff when leaving a car of the defendant, a letter, bearing a date over seven months before the commencement of the action and written by one to whom as a witness of the accident the defendant had addressed a letter making inquiries regarding the circumstances under which the accident occurred, is admissible in evidence as a declaration of a deceased person under R. L. c. 175, § 66, upon proof of the death of the writer, if the letter bears internal evidence that the answers to the inquiries were made in good faith and upon the personal knowledge of the writer.

A street railway company, within six days after an accident to a passenger, addressed a letter to a certain person stating that his name had been returned to it as a witness of the accident, and asking him to fill out answers to questions on a blank inclosed. The person addressed did as requested and sent the blank. thus filled out, to the company dated the day after that of the company's letter to him. The paper was as follows: "Did you see the accident? Yes. Where did it occur? Near Vine street on Dudley. What day and at what hour did this accident occur? About 6.18 o'clock P. M. on 20th of July. Where were you when it occurred? Sixth seat from the front of car on right hand side. Was car standing or moving? If moving about how fast? Car was moving about 2 miles an hour. Give full account of accident as witnessed by you. Saw lady signal Conductor he puled bell to stop car was comeing to a stop when lady started to get off conductor said wait until car stops didn't wait but steped off backwards and fell. What is your full name and address? Francis J. Reid, 42 Leonard St., Dorchester, Mass. My Business Address is Dated, July 26th 1905." Seven months later the passenger brought an action against the company, at the trial of which, the witness having died, the defendant offered and the judge admitted the paper in evidence under R. L. c. 175, § 66, as a declaration of a deceased person made in good faith before the commencement of the action and upon the personal knowledge of the declarant. Held, that the action of the judge was warranted.

Knowlton, C. J. The only exception in these cases is to the admission in evidence of a writing as a declaration of a deceased person. The fact was established that on July 25, 1905, a letter was sent to one Reid from the accident department of the defendant corporation, reciting that his name had been returned as one of several witnesses of an accident which happened about vol. 208.

eighteen minutes past six o'clock on the twentieth day of July, 1905, at or near Vine and Dudley Streets in Boston, where a woman stepped from a moving car, and asking him to fill out a blank and return it. Reid died before the time of the trial. The paper was returned containing questions, the answers to which were in his handwriting, as follows: "Did you see the accident? Yes. Where did it occur? Near Vine street on Dudley. What day and at what hour did this accident occur? About 6.18 o'clock P. M. on 20th of July. Where were you when it occurred? Sixth seat from the front of car on right hand side. Was car standing or moving? If moving about how fast? Car was moving about 2 miles an hour. Give full account of accident as witnessed by you. Saw lady signal Conductor he puled bell to stop car was comeing to a stop when lady started to get off conductor said wait until car stops didn't wait but steped off backwards and fell. What is your full name and address? Francis J. Reid, 42 Leonard St., Dorchester, Mass. My Business Address is . Dated, July 26th 1905." There was no other evidence of the circumstances under which he wrote the answers.*

The plaintiffs contend that the declaration was inadmissible because it did not appear that the statement was made in good faith, or before the commencement of the action, or upon the personal knowledge of the declarant.

The contents of the paper and the fact that the statement was made in reply to such a letter as was sent were sufficient to warrant a finding of the judge † that the answers were made in good faith. A finding that they were made before the commencement of the actions was justified by the fact that they were given in reply to a letter sent on July 25, 1905, and that the paper bears date July 26, 1905. The actions were not commenced until March 7, 1906.

The paper, taken in connection with the manner of obtaining it, bears internal evidence that the answers were made upon the personal knowledge of the writer, sufficient to warrant the finding to that effect.



^{*} A witness identified the handwriting of Reid.

[†] Raymond, J.

The statute (R. L. c. 175, § 66) under which the declaration was admitted, has always received a liberal construction. *Hall* v. *Reinherz*, 192 Mass. 52. *Green* v. *Crapo*, 181 Mass. 55, 63. *Nagle* v. *Boston & Northern Street Railway*, 188 Mass. 88.

Exceptions overruled.

J. F. O'Connell, (D. T. O'Connell with him,) for the plaintiffs. F. W. Knowlton, for the defendant.

GEORGE DWYER vs. JOHN H. ELLS.

Suffolk. January 18, 1911. - March 2, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Attorney at Law. Practice, Civil, Costs.

An attorney at law, who as sole counsel has prosecuted an action at law to final judgment in behalf of his client, does not thereby become the owner of so much of the judgment as is taxable costs.

While, under R. L. c. 165, § 48, an attorney at law, who has prosecuted a suit to final judgment in favor of his client, has a lien on the judgment for the amount of his fees and disbursements, he has no rights in the judgment except those created by the statute, and therefore, subject to the lien, the entire judgment, including taxable costs, is the property of the client and not of the attorney.

Knowlton, C. J. This is an action to recover money collected by the defendant in satisfaction of an execution upon a judgment in favor of the plaintiff. The defendant was the plaintiff's attorney in the prosecution of the action in which the judgment was obtained. The question before us arises upon the defendant's exception to the refusal of the judge to instruct the jury as follows: "If the jury find as a fact that the defendant entered his appearance as an attorney at law in the case of George Dwyer v. The Boston Elevated Railway Company, and prosecuted said case, as sole counsel, to final judgment in favor of his client, the taxable costs accruing in said case are, as a matter of law, the property of the defendant, and the jury should find a verdict for the defendant, if plaintiff's claim is for said taxable costs." Other matters were litigated in regard to defenses set up in the answer, with which we have no concern.

The instruction requested is not founded upon the R. L. c. 165, § 48, which gives an attorney who has prosecuted a suit to final judgment a lien upon the judgment and execution for his fees and disbursements. It rests upon a different contention, namely, that the taxable costs are the property of the attorney. It does not even make a distinction between different kinds of taxable costs, such as those allowed for witness fees, or officers' fees, which often are paid by the party and not by the attorney, and those that are on account of the services of the attorney, like the attorney's fee allowed by the statute in the taxation of costs. It seems plain that, upon this record, it does not appear that the instruction could have been given.

The judgment for costs is a judgment in favor of the party, not of the attorney, and the money represented by the costs is the property of the party. The attorney is given a lien by the statute for his fees and disbursements, upon the entire judgment—that part of it which is for damages, as well as that which is for costs. He has no rights in the judgment except the lien created by the statute. The creation and existence of this lien are inconsistent with his ownership of the judgment, or of any part of the judgment, upon which the lien is given.

In the R. L. c. 203, § 1, it is provided that in ordinary cases "the prevailing party shall recover his costs." The general subject is considered in *Bruce* v. *Anderson*, 176 Mass. 161, 163.

F. F. Collier, for the plaintiff.

W. H. Thorpe, for the defendant, submitted a brief.

PATRICK BOYLE vs. SIMON J. DONOVAN.

Suffolk. January 16, 1911. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, Employer's liability.

At the trial of an action by a longshoreman against his employer for personal injuries alleged to have been received, while the plaintiff was assisting in unloading bales of cotton from a vessel into the second story of a warehouse,

Exceptions overruled.

by reason of negligence of a superintendent of the defendant or of a defect in the ways, works or machinery used by the defendant, there was evidence that the plaintiff in the course of his duties was upon a staging built under the direction of the superintendent opposite the second story of the warehouse and that a crosspiece near the outer end of the staging was not fastened to the standards; that the bales under the superintendent's direction were being hoisted from the deck of the vessel by a winch, the hoisting cable from a boom running down so near to the end of the staging that the bales had to be given a swinging push by the "hooker-on" from the deck of the vessel to prevent their hitting the staging, that the use of a guy rope would have prevented the bales from hitting the staging, and that no guy rope was used. The accident was caused by an ascending bale striking the end of the staging, lifting or tipping it and causing it to fall with the plaintiff. There also was evidence that the plaintiff had helped to put up the staging and knew of its supports; but there was no evidence that a similar accident ever had occurred before, and the plaintiff testified that he never before had seen such an accident. Held, that the questions, whether the superintendent of the defendant was negligent, whether there was a defect in the ways, works or machinery for which the defendant was chargeable, and whether the plaintiff had assumed the risk of the injury, all were for the jury.

An employee cannot be held to have assumed the risk of an injury which he receives unless he knew and appreciated, or ought reasonably to have known and appreciated, the danger of it.

MORTON, J. This is an action of tort under the employers' liability act to recover for personal injuries received by the plaintiff while in the defendant's employment as a longshoreman at the "Hoosac Tunnel Docks" so called, in Charlestown. The declaration was in two counts, the first alleging gross negligence of the defendant and negligence of a superintendent, and the second alleging a defect in the ways, works or machinery. The trial judge ruled and instructed the jury that there was no evidence of gross negligence, and submitted the case to the jury on the negligence of the superintendent and the defect in the ways, works or machinery. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the trial judge to rule as requested, and to the charge so far as inconsistent with the instructions requested.

We think that there was evidence of negligence on the part of the superintendent or foreman and of a defect in the ways, works or machinery.

At the time of the accident the defendant was engaged in unloading cotton from a steamer and storing it in the loft of

^{*} Hardy, J.

a building on the wharf. The bales were hoisted from the hold by one winch to the main deck and from the main deck to a movable stage running into the loft by another winch. The plaintiff was on the stage trucking the cotton into the loft, having been directed by the defendant's foreman to go to work there shortly before the accident. As one of the bales was hoisted up it struck the corner or end of the stage, lifting it up or tipping it and causing it to fall with the plaintiff upon it. The hoisting rope to which the bale was fastened was rigged upon the head or end of a boom upon one of the masts. The boom was so adjusted that the rope came down close to the end of the stage and the bales were liable to strike the stage as they were hoisted up unless given a swinging push by the "hookeron" as he was called, who was on the deck of the vessel. There was no tag or guy rope to guide the bales. The defendant's superintendent or foreman had charge of the work of unloading, and directed where the boom should be swung and the stage should be placed, and we think that it could have been found to be negligent on his part to place the boom or allow it to be placed so that the bales were liable to strike the stage as they were hoisted up, and to have no tag or guy rope to guide them. We think that it also could have been found that the crosspiece on which the outer end of the stage rested should have been securely fastened in some way to the standards by which it was supported, and that not to have it so fastened was a defect in the ways, works or machinery. The question in each instance was, it seems to us, for the jury.

The defendant contends that the plaintiff assumed the risk. The plaintiff was an experienced longshoreman, having been in the business since 1882, and was familiar with the method of unloading cotton. He had helped to run out the stage on the morning of the accident and knew how it was supported. But there was no evidence that a similar accident had ever occurred before. The plaintiff testified that he never had seen such an accident except at the time when he was hurt. The stage was very heavy, weighing, as there was evidence tending to show, from a ton to a ton and a half. In addition there was the weight of the men and their trucks and a bale of cotton kept on the stage to render the loading of the trucks easier. The



probability is that if the possibility of such an accident occurred to any one, the weight of the stage and what would be on it was deemed sufficient to prevent it. The real fact, however, probably was that the possibility of such an accident did not occur to any one, and if it did not we do not see how it can be ruled as matter of law that the risk was an obvious one and that the plaintiff assumed it. A plaintiff cannot be held to have assumed the risk unless he knew and appreciated it or ought reasonably to have known and appreciated it. See Ford v. Fitchburg Railroad, 110 Mass. 240; Howard v. Fall River Iron Works Co. 203 Mass. 273.

It was for the jury to say whether taking all of the circumstances into account the defendant was at fault, and whether taking the plaintiff's experience into account the risk was so common and obvious that he assumed it.

Exceptions overruled.

- W. B. Farr, for the defendant.
- G. W. Reed, for the plaintiff.

GEORGE J. MACDONALD, administrator, vs. Edison Electric Illuminating Company.

Norfolk. January 16, 17, 1911. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, In use of electricity.

In an action by an administrator against an electric lighting company for the death of the plaintiff's intestate, there was evidence tending to show the following facts: The plaintiff's intestate, when killed, was an employee of a telephone company, and, for the purpose of working upon wires of his employer which were in a cable box, was upon a pole which also held a high tension wire of the defendant so placed that when the cover of the cable box was opened and raised, it would strike the defendant's wire which was on the left of the box as one faced it. The cable box ordinarily was kept closed. The plaintiff's intestate was seen to fall from the pole, and was found to be dead with electricity burns on the back of his left hand between the second and third fingers. The wire of the defendant immediately after the accident was found to be exposed through the insulation at the point where the box cover would come in contact with it, and to have a piece of flesh "sizzling" upon it, while the cable box was found with its cover unfastened, but without anything having been done to

its interior. There was no other evidence as to what the plaintiff's intestate was doing when he was killed. Held, that there was no such evidence of decrease on the part of the plaintiff's intestate as to warrant a verdict against the defendant.

TORT for the death of the plaintiff's intestate, Terrence Redmond, alleged to have been caused by his coming in contact with an electric wire of the defendant which it negligently had permitted to be improperly insulated. Writ dated September 11, 1906.

In the Superior Court the case was tried before Sherman, J. There was evidence tending to show the following facts:

Redmond, when killed, was, in the course of his duties as an employee of the New England Telephone and Telegraph Company, upon a pole which had four crossarms, the highest being occupied by fire alarm wires, the second and third by telephone wires, and the fourth, which was four feet and a half below the third, by two high tension and two dead wires of the defendant. The fifth crossarm was occupied by street railway wires. low the fourth crossarm was a cable and cable box of the telephone company. The cable box had a cover which was kept fastened down so as to prevent water from getting into it. Below the cable box was a seat so placed that one could sit upon it and work upon the wires in the box. The cover of the box, when raised, would come into contact with one of the high tension wires of the defendant at a place where, there was evidence to show, there was an opening in the insulation leaving the wire exposed.

On the day of the accident Redmond had told his fellow employees that he had to make some changes in the wires in the cable box above described, and two or three moments before his death he was seen sitting before the cable box and later was seen to fall to the ground.

An examination of Redmond after his death showed burns as from electricity on the back of his left hand between the second and third fingers. An examination of the defendant's cable showed some flesh still "sizzling" on the cable at the point where the insulation was worn off. An examination of the cable box showed its cover loosened, but that nothing had been done to the wires in the interior.

At the close of the plaintiff's evidence the presiding judge ordered a verdict for the defendant and reported the case to this court for determination, as stated in the opinion.

James J. McCarthy, (W. J. O'Donnell with him,) for the plaintiff.

H. F. Hurlburt, Jr., for the defendant.

MORTON, J. This is an action of tort to recover for the death of the plaintiff's intestate alleged to have been caused by the defendant's negligence at Canton on July 16, 1906. At the close of the plaintiff's evidence the trial judge directed a verdict for the defendant and reported the case with the stipulation. agreed to by the parties, that if the ruling was wrong judgment should be entered for the plaintiff for \$2,500, otherwise, for the defendant. Certain evidence was introduced at the trial subject to the defendant's exceptions, and is contained in the report. In regard to that the report has the following statement by the presiding judge: "Believing that the case should be finally decided, I have set out the said exceptions and reserve for the full court the question as to whether or not they should be considered." We construe this as meaning that if the ruling directing a verdict for the defendant was wrong as the case stands but would not be if that evidence was excluded, then the question of its admissibility is to be considered; otherwise not. We see no objection to this form of report, but we do not find it necessary to consider the question of the admissibility of the evidence since we are of opinion that as the case stands the ruling directing a verdict for the defendant was right.

We assume in favor of the plaintiff that there was evidence of negligence on the part of the defendant in suffering the insulation upon the wire to become thin and worn. One witness testified that it was worn off so that the wire was exposed at a place where the cover of the box if swung up would strike it. But we are constrained to hold that there is no such evidence of due care on the part of the plaintiff's intestate as to warrant a verdict against the defendant. There was evidence tending to show that there was a burn caused by electricity between the second and third fingers of the left hand of the intestate, extending to the bone, and that the death of the intestate was caused by accidental electrocution. There was also evidence

tending to show that two or three minutes before his death the deceased was seen sitting on the seat facing the box. But there is no evidence as to what occurred between that time and the time when he fell to the ground. He was sent to make changes in the wires in the box. But the uncontradicted evidence showed that nothing had been done to them. One witness testified that the cover to the box was loose. But there was nothing to show whether it had been left so by some one else, or whether the box had been opened by the intestate. The plaintiff contends that the accident was caused by the raising of the cover by the intestate with his left hand, and that as he was. raising the cover his left hand came in contact with the worn place on the wire and he received the shock which resulted in his death. It is possible and perhaps there is a strong probability that the accident occurred in that way. But whether it did or not is wholly a matter of conjecture, and the plaintiff has, therefore, as it seems to us, failed to sustain the burden of showing that the accident happened under such circumstances as to render the defendant liable. The entry must be judgment on the verdict.

So ordered.

COMMONWEALTH vs. WILLIAM P. WHITE & others.

Essex. January 20, 1911. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Conspiracy, To bribe. Evidence, Against different defendants indicted jointly, Admissions and confessions. Jury. Practice, Criminal, Challenge of jurors.

At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, although the statements of the different defendants, considered as admissions, are competent evidence only against the persons who made them, yet, if a material transaction, like the acceptance of a bribe or an attempt to influence one of the aldermen by the gift of a bribe, was accomplished wholly or in part by words, proof of the transaction by stating the words is competent against any of the defendants in whose trial the transaction is a circumstance proper to be proved.

At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, there was evidence of conversations and acts of the mayor which tended to show that he took part in such a conspiracy and of many circumstances tending to show that the mayor had knowledge that attempts at bribery were going on and participated in them. Upon exceptions alleged by the defendant mayor alone, it was held, that there was evidence warranting a finding that that defendant conspired with the persons who were engaged in the bribery to accomplish, if possible, the removal of the chief engineer of the fire department by that means, which was sufficient to sustain a conviction under the indictment.

At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, a witness, called by the Commonwealth, testified that, at the time that this removal was being most actively agitated, the mayor and two of the persons who were shown to have been active in attempting bribery were in the mayor's office together, and that the mayor's private secretary asked the witness to retire, saying that "they wanted to have a private conversation." The presiding judge allowed the jury to consider this evidence against the defendant mayor if they found that the remark was made with the knowledge and consent of that defendant. Upon exceptions alleged by the defendant mayor alone, it was held, that there was no error; that something reasonably might be inferred as to authority to make the remark from the fact that the private secretary of the mayor assumed to give a direction to a visitor in the mayor's presence, and that on the evidence the jury might have found that the defendant mayor heard the remark and from his silence might infer his assent to it.

Under R. L. c. 176, § 29, which is the only statute on the subject, there is nothing requiring the Commonwealth in a criminal case to exercise its right of challenging jurors before the defendant or to prevent the Commonwealth from challenging jurors peremptorily after the defendant has exhausted all his challenges. In the absence of a direction by the court defining the order and manner of making the challenges, the right to challenge continues on both sides until the jurors are sworn.

Knowlton, C. J. This is an indictment against the defendant White, who was the mayor of the city of Lawrence, and five other persons, charging them with having conspired together, and with other persons whose names are to the jurors unknown, to bribe three members of the board of aldermen of that city to vote in favor of the removal of one Hamilton from the office of chief engineer of the fire department, which office he held by the appointment of this defendant as mayor. The exceptions were taken by White alone, and he is the only defendant before us. The indictment is in two counts, charging the substantive offense in different forms, which it is not impor-



[•] The six defendants were tried before Schofield, J. One was acquitted, and the others, including the defendant White, were convicted.

tant to consider. The defendant desired to remove Hamilton from the office, and wished to have a majority of the board of aldermen, which consisted of six members, vote to approve the removal of him.

The exceptions argued by the defendant relate to three subjects: First, the refusal to rule that there was no evidence to warrant a verdict of guilty; second, the alleged errors in ruling upon the admission of evidence; third, the impanelling of the jury, and the alleged error in allowing certain peremptory challenges by the Commonwealth.

There was much evidence tending to show attempts to bribe aldermen by some of the defendants. This came through the testimony of numerous witnesses as to what was said and done, constituting such attempts. The defendant's counsel has argued the case as if none of this testimony was to be considered by the jury, as against the defendant, for any purpose. When the district attorney offered different conversations between different defendants and individual members of the board of aldermen, the judge, after objection by the defendant White, admitted the conversations and statements only as against the particular defendant who was the party to them, telling the jury that he would instruct them later as to how far and for what purposes the statements could be considered. Plainly the conversations and statements, considered as in the nature of admissions, were competent only as against the persons who made the statements or took part in the conversations. This was the substance and effect of the ruling.

But if a material transaction, like the acceptance of a bribe, or an attempt to influence one by the gift of a bribe, was accomplished wholly or in part by words, proof of the transaction by stating the words would be competent against any person in whose trial the transaction might be important as a circumstance proper to be proved. The substance of the offense charged against the defendant can be proved only as such offenses are commonly proved, by circumstantial evidence.

There was testimony of a statement by the defendant in December, 1909, that, if he was re-elected and could get four aldermen to stay, he would remove Hamilton as chief of the fire department, that he was an ingrate; that he repeated this state-



ment several times; that he asked the different aldermen how they stood in regard to the removal of Hamilton. It was well established that the purpose and desire of the defendant in reference to the removal of Hamilton were like those of the persons who were shown to have offered bribes. When the mayor asked the members of the board of aldermen how they stood on Hamilton's removal, "he started walking away and said, 'There will be no police appointments.'" Afterwards. when the grand jury were investigating the matter, he sent for a witness and asked him to state to the grand jury "that it was the wish of the marshal that these police officers be appointed; that he wanted the answers to correspond." There was evidence that about the time when these attempts at bribery were going on, the mayor had private interviews with some of the persons who were engaged in the attempts. It appeared that when money had been paid to one of the aldermen as a bribe and the removal of Hamilton had not been accomplished, the mayor took active measures, with the aid of the city marshal and other officers, to obtain the return of it, that he told the reporters "that a friend of his had given \$1,000 to a member of the city council for a certain matter, and that the friend came to him and told him about it"; that he took down a law book and read in regard to the punishment of the offense of taking money as a bribe to one from whom he was trying to get help in getting back the money, and who had taken a part in the bribery. The evidence also tended to show that he pretended to read from the book that which was not in it.

There was evidence that, afterwards, an order was passed by the city council, requesting the mayor to call the attention of the district attorney to the one-thousand-dollar transaction. There was testimony that several days afterwards, at a meeting of the city council, he was asked if he had done anything about it, and he answered jokingly, in a way to indicate that he did not intend to do anything. There was evidence that he took no measures to commence the prosecution of any person. There were many other circumstances properly to be considered on the question whether the mayor had knowledge that attempts at bribery were going on, and participated in them.

We are of opinion that there was evidence to warrant a find-

ing that the defendant conspired with the persons who were engaged in the bribery, to accomplish, if possible, the removal of Hamilton by that means.

A witness was permitted to testify, against the defendant's objection, that about the time of the appointment of Hamilton the defendant had a talk with the witness about the appointment, and said, "Well, Jim, I have kept my word. I said I would appoint him and I did appoint him, though I was offered \$2,500 not to appoint him." This tended to show that, at the time of the appointment, he knew that a large sum of money was ready to be paid to prevent the appointment, and to put the This was not very long before office in the control of another. his effort to remove him. The evidence showed that he knew who was ready to pay the money, and that he was in such relations with the person or persons who wanted to pay it that they made him a direct offer of \$2,500 to control the appointment. These are facts of no consequence, except as they indicated conditions and his knowledge of conditions presumably existing at the time of the attempt at removal. In connection with other circumstances, we are of opinion that these matters might be considered by the jury in determining his attitude and conduct when attempts to obtain the removal by bribery were going on.

Another witness, called by the Commonwealth, testified that, just at the the time when this removal was being most actively agitated, the defendant and two of the persons who were shown to be active in attempting bribery were in the mayor's office together, and that the mayor's private secretary asked the witness to retire. "He said they wanted to have a private conver-This testimony was excepted to. The jury were allowed to consider it, only if they found that this remark was made with the knowledge and consent of the defendant White. Something reasonably might be inferred as to authority, from the fact that the private secretary of a mayor assumed to give a direction to a visitor in the mayor's presence. As we understand the testimony, the jury well might find that the defendant heard the remark, and from his silence they might infer his assent We are of opinion that the evidence was competent.

It is argued with great earnestness that there was error in permitting the Commonwealth to challenge two of the jurors

peremptorily, after the defendants had exhausted all their challenges. The statute touching this subject is found in the R. L. c. 176, § 29, and is as follows: "Peremptory challenges shall be made before the commencement of the trial and may be made after the determination that a person called to serve as a juror stands indifferent in the case."

In this case seven jurors were called by the clerk, of whom two were challenged by the Commonwealth, leaving five in the jury box. The defendant's counsel then asked leave to interrogate the jurors called for the trial. The judge ruled that only the statutory questions should be put, and they were put by the judge to these five jurors, and to others as they were called. Some were excused by the judge as not appearing to stand Others were found to be indifferent. indifferent. twelve men, so found indifferent by the court, were sitting in the jury box, the defendants respectively exercised their rights of challenge. New jurors were called to take the place of those challenged, and each new juror was interrogated by the judge. Some were found to stand indifferent and others were excused. The defendants continued exercising their rights of challenge until all of them were exhausted. when twelve men were sitting in the jury box and before they were sworn, the district attorney challenged two of the jurors peremptorily. The defendant objected, contending that the district attorney must exercise his right of challenge before the defendants, and that, by his failure to do so, he had lost it. The judge found as a fact that the district attorney did not intend to waive his right, and allowed his challenges to stand. The defendant excepted.

The only statute on the subject is that quoted above. There is no rule of court prescribing the manner in which these rights shall be exercised. Usually in civil cases, and often in criminal cases, it is exercised by the parties without any order of the court, and without an attempt to have their rights defined as to the order or method of making the challenges. In cases where the parties think the right very important, and usually in trials for murder, a direction is given by the court, defining the order and manner of making the challenges. In the absence of such a direction, or of conduct plainly indicating a waiver, the right

of both parties continues until the jurors are sworn. If in any case there is danger of a misunderstanding about it, it is well that the court should give such directions as will fairly secure the rights of both parties.

It seems that there was a misunderstanding on the part of counsel for the defendants in this case, as they thought there was a rule requiring the Commonwealth to exercise its right first, if it wished to exercise it at all. There was no error of law in the impanelling of the jury.

Exceptions overruled.

H. Parker, (H. H. Fuller with him,) for the defendant White. W. S. Peters, District Attorney, for the Commonwealth.

FREDERICK R. SEARS & others, executors, vs. Assessors of the Town of Nahant.

SAME vs. SAME.

Essex. January 26, 1911. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Mandamus. Certiorari. Tax, Abatement. Constitutional Law.

A writ of mandamus will not lie to command the assessors of a town to change their decision refusing to abate a tax.

A writ of certiorari will not be issued directed to the assessors of a town for the purpose of revising and correcting errors of law alleged to have been made by them in refusing to abate a tax.

The remedies given by R. L. c. 12, §§ 77, 78, to a person aggrieved by the refusal of the assessors of a town to abate a tax are constitutional.

Two pertitions, filed on November 30, 1910, respectively for a writ of mandamus and for a writ of certiorari against the assessors of the town of Nahant.

To the petition for the writ of mandamus the respondents demurred. In the second case the respondents filed a motion to dismiss the petition.

The cases were heard together by *Braley*, J. In the first case he sustained the demurrer of the respondents, and ordered that the petition be dismissed. Upon the petition for a writ of certiorari he ruled that that remedy would not lie upon the allega-

tions contained in the petition, and ordered that the petition be dismissed.

At the request of the petitioners, the justice reported the cases for determination by the full court. If the rulings were right the petitions severally were to be dismissed. If the rulings were or either of them was wrong, such orders were to be made as the full court might determine.

- B. E. Eames, (O. D. Young with him,) for the petitioners.
- P. Nichols, for the respondents, was not called upon.

Knowlton, C. J. These are two petitions, one for a writ of mandamus and the other for a writ of certiorari, against the assessors of the town of Nahant. The purpose of the petitions is to correct an alleged error of the respondents in assessing personal property to the petitioners as executors of the will of Frederick R. Sears.

The petition for a writ of mandamus is for a process commanding the respondents as assessors to abate the tax. To this a demurrer was filed. The petition shows that the respondents, who are a quasi judicial board, heard the application of the petitioners for an abatement of the tax and denied it. There is no reason to doubt that they decided the questions raised by the application in accordance with their view of the law and facts before them. This court has no right to command them to decide otherwise. Gibbs v. County Commissioners, 19 Pick. 298. Chase v. Blackstone Canal Co. 10 Pick. 244. Morse, petitioner, 18 Pick. 448. United States v. Lawrence, 8 Dallas, 42. This is so because it is their right and duty to decide according to their own best judgment.

Besides, the court will not issue a writ of mandamus where there is another remedy provided by statute. Perry v. Hull, 180 Mass. 547. Selectmen of Gardner v. Templeton Street Railway, 184 Mass. 294, 297. Finlay v. Boston, 196 Mass. 267. The demurrer was rightly sustained.

The petition for a writ of certiorari is founded upon the same facts. They are set out in Sears v. Assessors of Nahant, 205 Mass. 558, as well as in the petition. The petition shows that a petition for an abatement of the tax in question was denied by the assessors, and that then the petitioners filed their appeal to the Superior Court under the R. L. c. 12, § 78, and that that

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court dismissed the appeal and reported the case to this court, which ordered a judgment to be entered upon the finding in favor of the respondents.

These petitioners now seek to have this court issue a writ of certiorari to the assessors, for the purpose of revising and correcting alleged errors of law made by them in denying the petition for abatement.

The law applicable to such cases of assessment is very fully stated and considered in the decision last cited. There are statutory provisions covering all that was done. The petitioners undertook to pursue the remedies prescribed by statute. a decision against them by the assessors, and then a decision against them by the Superior Court, and finally a decision against them in this court, they seek this extraordinary remedy, which has no application to the case. If there were no provision for revising the action of the assessors in dealing with questions of law arising upon the petition addressed to them, this court might review it on certiorari. But there is a provision for an appeal to the county commissioners or to the Superior Court. R. L. c. 12, §§ 77, 78. These petitioners have already had a review of this action of the assessors by proceedings under the statute, and no error was discovered in it. Sears v. Assessors of Nahant, ubi supra. This is a sufficient reason for denying this petition. Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206, 212.

It has often been held that the only remedy for an over assessment is to petition for an abatement, and, if necessary, to take an appeal under the statute. Osborn v. Danvers, 6 Pick. 98. Boston Water Power Co. v. Boston, 9 Met. 199, 204. Bates v. Boston, 5 Cush. 93, 97. Salmond v. Hanover, 13 Allen, 119. Harrington v. Glidden, 179 Mass. 486. This remedy the petitioners have pursued as far as possible.

The petitioners contend that, under the construction that this court has put upon this statute, it is unconstitutional. It is difficult to see how the question of constitutionality arises upon either of these petitions. But, if it is involved, we think it is practically settled by the decisions. The statute has been before the court a great many times, without, so far as we remember, an expression of doubt in regard to its constitutionality until

the discussion in Harrington v. Glidden, ubi supra, when the court dismissed the elaborate argument of the defendant on the question in one sentence, (at page 495,) affirming the constitutionality of the law. The case was taken to the Supreme Court of the United States, and the constitutionality of the statute was there again affirmed in Glidden v. Harrington, 189 U. S. 255. It is said by the petitioners that there has been a revision and re-enactment of our laws on taxation since the decision just cited. But the re-enactment has not materially changed the provisions in question. The decision seems to us to cover the question raised in the present case. See also Kentucky Railroad Tax Cases, 115 U. S. 321, 334; Security Trust & Safety Vault Co. v. Lexington, 203 U. S. 323, 333; Davidson v. New Orleans, 96 U. S. 97, 104.

The petitioners rely strongly upon the decision in Central of Georgia Railway v. Wright, 207 U. S. 127, in which it was held that a statute of Georgia was unconstitutional because it gives to a taxpayer no opportunity for a hearing, if, "without fraudulent intent and upon reasonable grounds, [he] withholds property from tax returns with an honest belief that it is not taxable." That statute differs materially from ours, in that our statute gives every taxpayer an opportunity for a hearing, not only through the notice of the proposed assessment and the requirement to bring in a list, but upon his petition for an abatement, when he is permitted to show, if he can, that there was good cause for his delay in bringing in his list. Again, in R. L. c. 12, § 77, he has an opportunity to show, upon his appeal before the county commissioners or in the Superior Court, that "there was good cause for the delay." One who acts "upon reasonable grounds" in delaying to bring in his list, will have a full opportunity to be heard before the assessors or the court, as to the amount for which he should be assessed. In this case both the assessors and the court, upon hearing, failed to find that the petitioners had good cause for their delay. One who fails to comply with this requirement of the statute, without good cause, cannot justly complain if the assessors refuse to abate a tax assessed under the R. L. c. 12, § 47, upon their ascertainment, as nearly as possible, of the particulars of his estate. In each case the entry will be

Petition dismissed.

TRADERS COMMERCIAL COMPANY vs. TICHNOR BROTHERS, INCORPORATED.

Suffolk. January 27, 1911. — March 2, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Contract, Construction, In writing. Evidence, Oral affecting writings.

An order in writing, filled in upon an order blank of the seller, for a large number of silver and gold Christmas and New Year post cards, which is dated and is addressed to the seller and is signed by the purchaser, and states the number of cards to be shipped, the descriptive trade number by which they are known and the number of designs, and under the word "Remarks" has the figures and words, "\frac{1}{2} silver \frac{3}{2} gold," and which also states the price per thousand and the total amount to be paid, the terms of payment and the transportation line by which the cards are to be shipped, is not a mere bill of parcels but is a complete contract in writing without ambiguity, which cannot be varied or explained by oral evidence.

CONTRACT, by one trading corporation against another, for the price of two hundred and fifty-nine thousand two hundred post cards alleged to have been purchased by the defendant from Spitzer and Company, the assignors of the plaintiff, under an agreement in writing, which is printed below. Writ dated December 31, 1909.

In the Superior Court the case was tried before Lawton, J. The plaintiff put in evidence an assignment in writing from Spitzer and Company transferring to the plaintiff their claim against the defendant for the price of the post cards sold under the agreement sued upon. That instrument, the execution of which was admitted, was filled in upon an order blank of Spitzer and Company, and was as follows:

Order No 167

June 10 1909

Spitzer & Co., Post Cards

12 Waverly Place, New York

Ship to

Tichnor Bros Inc

At

44 North Market St

How Ship

When

Boston Mass.

as soon as ready by

Terms: October 1st

Metropolitan

60 days 2%

Line

This order is not subject to cancellation.

No.	Des.	Quantity	Price		Amount		Remarks
250,0		# 900	8.		750		i silver.
	86	designs					₹ Gold.
	silver	& gold					
Xmas	& New	Year Cards					
						6 sets	samples
					Tich	ichnor Bros Inc	
							L Tichnor

At the close of the evidence the judge ruled as a matter of law that the contract was not ambiguous, and that therefore there was no question for the jury. He ordered a verdict for the plaintiff in the sum of \$800.93 which was agreed to by the parties, and no question was made as to the correctness of the amount. The defendant alleged exceptions.

J. P. Magenis, (J. Wentworth with him,) for the defendant. L. M. Friedman, for the plaintiff.

MORTON, J. The judge ruled that the contract was not ambiguous and that there was nothing for the jury, and directed a verdict for the plaintiff. The amount of the verdict was agreed to by the parties and there is no question as to the correctness of the verdict in that respect. The defendant excepted to the ruling and direction and the exception thus taken presents the only question before us. We think that the ruling and direction were right.

The only particular in respect to which the defendant contends that there is an ambiguity is in regard to the number of designs. It contends that there were to be seventy-two instead of thirty-six, the number that was shipped to them. But it is entirely plain, it seems to us, that the contract is for thirty-six designs and not seventy-two. The words and figures are "86 designs silver and gold. Xmas and New Year Cards," and in the margin, under the head of "Remarks," are the words and figures "\frac{1}{2} silver \frac{2}{2} gold." We do not see how it is possible to

construe this as meaning anything except that there were to be thirty-six designs and one third of them were to be in silver and the other two thirds in gold. If there was no ambiguity, then the question of the construction of the contract was plainly for the court. See Strong v. Carver Cotton Gin Co. 197 Mass. 53, 59.

The defendant further contends that the alleged contract is only a bill of parcels, and that therefore the evidence of previous negotiations was competent. In addition to what we have quoted, the writing contains the total number of cards to be shipped, with the descriptive number by which they were known, the price per thousand, and the total amount to be paid, the terms of payment, when and by what line the cards are to be shipped, and the names of the sellers, and is signed by the defendant and dated. We cannot conceive of anything more that would be necessary to constitute a written contract for the purchase and sale of goods.

Exceptions overruled.

JOHN J. EVERSON vs. CASUALTY COMPANY OF AMERICA.

Middlesex. November 11, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Insurance, Accident. Evidence, Competency, Chalks and models. Practice, Civil, Exceptions, Conduct of trial.

In an action upon a policy of accident insurance for the loss of the plaintiff's right hand, which was amputated in consequence of its injury in the burning of a building, where a defense relied upon is that the plaintiff at the time of obtaining the insurance was deeply in debt and procured the policy for the purpose of defrauding the defendant, and that in pursuance of this purpose he voluntarily suffered the physical injury for which he sought to recover, the defendant may be allowed to introduce any evidence tending to show that the plaintiff at about the time the policy was issued was in straitened financial circumstances and had immediate need of ready money.

If at a trial letters are admitted in evidence each of which contains matters material to the issues raised by the pleadings, but some of which also contain other matters which do not relate to such issues, and if the party against whose general objection the evidence is admitted does not ask to have the irrelevant parts stricken out or to have the effect of the letters restricted to certain issues, his general exception to the admission of the letters will not be sustained.

If at a trial certain letters are admitted in evidence against the objection and exception of one of the parties, and afterwards the judge instructs the jury to find in favor of the excepting party upon all the questions to which the letters relate,

this makes the admission of the letters wholly immaterial, as it cannot possibly have harmed the excepting party.

The general rule in regard to the admission of photographs, plans and models is that the question whether they are to be received or not is a preliminary one resting largely in the discretion of the trial judge, the exercise of which will not be revised unless it appears to have been plainly wrong or in violation of some rule of law governing the rights of the parties.

In an action upon a policy of accident insurance for the loss of the plaintiff's right hand, which was amputated in consequence of its injury in the burning of a building, where a defense relied upon was that the plaintiff suffered the physical injury voluntarily for the purpose of obtaining the insurance money, the plaintiff testified that he received his injury by reason of his hand being caught under a door, which with its surroundings he described. From the plaintiff's description and from a sketch which the plaintiff had made the defendant had a model prepared, which was set up in the basement of the court house, and the defendant offered to make any change in the model under the plaintiff's direction which was required to make it conform in every detail to the original. A witness testified that the plaintiff had inspected the model and had spent considerable time in examining it and in making full measurements of it, and that the plaintiff had said, in answer to a question from the witness, that the model was practically according to his specifications and was correct except in minor details. The presiding judge viewed the structure without the jury. The plaintiff's counsel objected to the jury being permitted to see it, because the plaintiff, after examining the structure, had stated that it was not a correct representation of the door under which his hand was caught, that it could not be a fair representation unless shown as a part of a house and not as a disconnected object, and that it had not been verified sufficiently. The defendant again offered to correct the structure in any particular which the plaintiff or his counsel might suggest, but no suggestion of correction was made by them. Thereupon the presiding judge permitted the jury to inspect the alleged model, first saying to them, that he was about to let them see something which was alleged to be somewhat similar in structure to what the plaintiff had been telling about, that they might look at it as a chalk, so that they could understand how the plaintiff's evidence applied to the situation, and that the model might help them to understand the evidence. Held, that the action of the judge was a proper exercise of his discretion.

CONTRACT for \$10,050 upon a policy of accident insurance issued by the defendant on October 22, 1907, insuring the plaintiff for the period of one year against bodily injuries effected solely through external, violent and accidental means, with a provision that the amount otherwise payable should be doubled in case of certain injuries, including injuries sustained "while in a burning building," the plaintiff having lost his right hand, which was amputated in consequence of its injury by fire in a burning building, near works operated by the defendant about eight miles from the city of St. John in New Brunswick, on November 18, 1907. Writ dated April 21, 1908.

In the Superior Court the case was tried before *Hardy*, J. The matters relied upon in defense are stated in the opinion. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions relating to the acts and rulings of the presiding judge in admitting certain evidence and allowing the jury to inspect a certain model as described in the opinion.

- A. H. Russell, for the plaintiff.
- E. K. Arnold, (W. B. Luther with him,) for the defendant.
- RUGG, J. This is an action on a policy of accident insurance issued to the plaintiff by the defendant. The injury on which the claim is founded was the amputation of the right hand made necessary by burning. The circumstances appear with sufficient fulness in Everson v. General Accident, Fire & Life Assurance Corp. 202 Mass. 169, 174, 175, which was an action by the same plaintiff against a different defendant growing out of the same incident. Only questions of evidence are presented.
- 1. Among the defenses set up in the answer was one that the plaintiff at the time of the insurance was deeply in debt, and that he procured the issuance of the policy for the purpose of defrauding the defendant, and in pursuance of this purpose voluntarily suffered the physical injury complained of. Against the exception of the plaintiff, the defendant was permitted to examine him as to the amount of his property and his indebtedness and his need of money in order to carry forward his business, at about the time the policy was issued. It appeared he did owe obligations which it was impossible for him to pay in cash. was competent for the defendant to introduce any evidence which tended to show that the plaintiff was in straitened financial circumstances and had immediate need of ready money, as bearing upon the question whether the policy was fraudulently procured and the injuries voluntarily inflicted. Commonwealth v. Richmond, 207 Mass. 240.
- 2. The answer of the defendant set up cancellation of the policy and a failure of consideration, and that it was issued upon condition that the premium should be paid to the defendant within a reasonable time by one Wood, the plaintiff's duly authorized agent, and a failure so to pay. Wood was called as a witness by the plaintiff, and testified to facts which would warrant a finding that he was agent or broker for the defendant

within the meaning of St. 1907, c. 576, § 96. During his crossexamination, and subject to the general exception of the plaintiff to all transactions between the witness and the company subsequent to the payment of the premium by the plaintiff to him, the witness produced and there were admitted in evidence four letters tending to show that the defendant refused payment of the premium from the witness, and requested him to return the policy for cancellation. No specific objection was made to any part of the letters as not bearing upon any issue. These letters were received in evidence early in the trial during the crossexamination of a witness called by the plaintiff. They were all material as bearing on the issues raised by the pleadings, provided there had been proof at any stage of the trial that Wood was in fact the agent of the plaintiff (Green v. Star Fire Ins. Co. 190 Mass. 586; Horn v. Dorchester Mutual Fire Ins. Co. 199 Mass. 534), or that there was any arrangement whereby the issuance of the policy was conditioned upon payment to the defendant of the premium. It is conceivable that additional evidence bearing on the issues raised by the above recited portions of the answer might have made them material. The ruling of the judge when they were offered was merely that "all the facts ought to go in evidence. If they want any question of law, I will rule on it." This language, in the light of all the circumstances, fairly means that under the pleadings all the incidents attendant upon the issuance of the policy might be shown and then he would rule upon any special question of law that might be raised later, when all the events touching the transaction were in evidence. The facts as to whether Wood was the agent of the plaintiff in such sense that he could assent to an issuance of the policy conditional upon payment of the premium within a reasonable time. or could assent to a cancellation of the policy, were material under the answer of the defendant. There was something in each of the letters bearing upon each of these issues. In one of them were sentences which perhaps might not have been relevant, but no request was made by the plaintiff to order these sentences withheld from the jury or to restrict the letters to any particular issues. The plaintiff therefore cannot now complain unless some of the letters were harmful and wholly incompetent. Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 581.

As to the issues upon which the letters appeared material at the time they were admitted, the judge instructed the jury in favor of the plaintiff, that is, he instructed the jury that the policy was issued to the plaintiff and that the contract sued upon was made; that Wood was the agent of the defendant for receiving the premium, and that payment by the plaintiff to Wood bound the defendant; that the policy was issued upon a good and valid consideration, and that it had not been cancelled; and that Wood was not the agent of the plaintiff for any purpose material to the issues. These included all the questions upon which the letters appeared to have a competent bearing when offered. These rulings in substance rendered the letters wholly immaterial.

While a judge presiding over a jury trial should be jealous to protect the parties against harmful and irrelevant testimony, he cannot necessarily be held to a foresight of the end from the beginning. Upon the subjects as to which the letters then seemed to be pertinent, the judge instructed the jury wholly in favor of the plaintiff. If the plaintiff had desired that the letters should be stricken from the evidence, it was his duty to have raised that question by a specific request at a stage in the trial when it was apparent that they were not to be supported by such other evidence as might render them competent. His failure to do this gives him now no ground of exception.

8. The plaintiff testified that he received his injury by reason of his hand being caught under a door, which, as we understand, was attached to the side of a wooden drying chamber or flume by ordinary hinges and weighed sixty or seventy pounds, and was kept in place by gravity. The dimensions of this drying chamber and a general description of it had been given by the plaintiff in testimony at a previous trial, and he had attached a sketch of it with dimensions to a proof of loss furnished to the defendant under its policy. During the direct examination of the plaintiff the counsel for the defendant stated that he had prepared a model exactly as described in the proof of loss, which was set up in the basement of the court house, offering to make any change in it under the direction of the plaintiff in order that it might conform in every detail to the original. Thereupon the presiding judge viewed the structure in the absence of the jury. The plaintiff's counsel objected to the jury being permitted to see

it, because the plaintiff, having examined the structure, had stated that it was not a correct representation of the one in connection with which he received his injury; that it could not be a fair representation unless shown as a part of a house and not as a disconnected object, and that it had not been sufficiently verified. The defendant again offered to correct the structure in any particular which the plaintiff or his counsel might suggest, but no further suggestion was made by them. Thereupon the presiding judge permitted the jury to inspect the alleged model, first saying to them, "I am going to let you go down into the basement to observe something which it is claimed is somewhat similar in structure to this affair that the plaintiff is telling you I only let you go down there to . . . look at it as a chalk, so that we can understand how his evidence applies to the situation, that is all. . . . It may help you to understand the evidence." The plaintiff excepted. Thereafter one Moore testified that the alleged model had been constructed according to the sketch given by the plaintiff to the defendant, and from his testimony given in another case, and that its inside and outside dimensions, and the material of the door, its dimensions, hinges, method of fastening, inside construction, weight and relative place in the chamber or flume were approximately the same as were described by the plaintiff, and that after the structure was completed he inspected it in company with the plaintiff, who made full measurements of it and spent considerable time in its examination, and that thereafter the witness asked the plaintiff "if that flume was not in all respects practically according to his specifications and correct," to which the plaintiff replied that it was except in minor details.

The general rule respecting the admission of photographs, plans and models is that whether they are to be received or not is a preliminary question resting largely, though not entirely, in the discretion of the trial judge, whose duty is primarily to determine whether there is sufficient similarity between what is offered and the original which is the subject of inquiry to make it of any assistance to the jury in passing upon the issue before them. While the discretion of a trial judge in this regard is not unlimited, his action will not be revised unless it appears to have been plainly wrong or in disregard of some rule of law governing

the rights of the parties. As was stated by Chief Justice Gray in Blair v. Pelham, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. . . . Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception." Shea v. Glendale Elastic Fabrics Co. 162 Mass. 463. DeForge v. New York, New Haven, & Hartford Railroad, 178 Mass. 59. Baker v. Harrington, 196 Mass. 839. Field v. Gowdy, 199 Mass. 568. Ducharme v. Holyoke Street Railway, 203 Mass. 884, 894. Commonwealth v. Buxton, 205 Mass. 49.

The flume or chamber, in connection with which the plaintiff suffered his injury, does not appear to have been so simple in its construction and arrangement that it was not possible for the jury to obtain a better understanding of it by examination of a copy of it. The testimony of the witness Moore as to what the plaintiff himself had said about the model coupled with the offer to change it in any way that the plaintiff might direct and the refusal to accede to this proposition may well have satisfied the judge after his own inspection that the jury would be helped by an observation of it. These circumstances may have been found by him in the exercise of his discretion to overweigh the statement of the plaintiff himself that the structure was not like the original. We treat the representation as standing on the basis of a photograph, plan or model, especially in view of the statement in the charge to the jury, by which the judge called their attention to their "opportunity to observe the model . . . which I suggested was to be observed by you to help you to understand the evidence." It is to be noted, however, that the judge originally permitted the jury to see it merely as a "chalk." This word as used in practice in the courts means a rough representation, such for instance as a witness might make in outline upon a blackboard in the presence of the jury as illustrating his evidence, and not rising to the dignity of a scientifically accurate representation. It may be pictorial, mechanical or in sketch. Its use, however, for even this purpose is subject to the judicial discretion of the presiding judge, which, as before pointed out, is not unrestrained,

and it should not be permitted except after a preliminary determination that it throws sufficient light upon the issue to be helpful to the jury in reaching their verdict. Reference to it under the circumstances disclosed, even before the testimony of Moore, was not beyond, and was far from an abuse of, judicial discretion.

Exceptions overruled.

NEWTON CENTRE TRUST COMPANY vs. SUSAN M. STUART & another.

NEWTON CENTRE SAVINGS BANK vs. WILLOUGHBY H. STUART & another.

Suffolk. November 16, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Evidence, Declarations of deceased persons, Competency.

Upon an exception to the admission in evidence of a statement of a deceased person under R. L. c. 175, § 66, it must be assumed, unless the contrary is shown by the record, that the trial judge made all the findings necessary under that statute.

At the trial of an action against a husband and wife on certain promissory notes, amounting to \$32,000, purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. At the time of the trial the father of the wife was dead, and the presiding justice under R. L. c. 175, \$ 66, allowed the plaintiff to show that the father had said, "That scoundrel [meaning the husband] has persuaded her to put her name to over \$100,000 worth of that paper, and I know it because she has told me so." It appeared that at the time that this statement was testified to have been made the husband had given to a certain person notes purporting to have been signed by his wife amounting to \$277,000, but there was no evidence that at the time the wife's father made the statement the amount of notes which had been given by the husband was known and it probably was not known. The presiding justice, in admitting the evidence of the father's declaration, said to the jury that it should not be considered unless the jury found, first, that the wife made the alleged statement to her father, and, second, that she intended the statement to include the notes sued upon. Held, that, thus guarded by the instruction of the presiding justice, there was no error in the admission of the testimony.

At the trial of an action against a husband and wife on certain promissory notes purporting to be signed and indersed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures about sixty in number offered by the plaintiff and admitted by the trial justice as standards also were not in the wife's ordinary handwriting. The wife testified that her father had wished her not to dispose of any property that he had given to her. The trial justice admitted evidence offered by the plaintiff to the effect that it had been arranged between the wife and her father that all the dividends from certain shares of railroad stock which her father had given to her should be sent to her in care of her father, in order that he might see that she had not sold the shares, that every quarter immediately after the payment of the dividend she sold these shares and immediately before the next dividend accrued she bought them back again with borrowed money, giving directions to have the dividends sent to her father, who then handed them to her. The plaintiff offered this evidence as showing a part of a scheme to conceal the wife's financial transactions from her father, which the plaintiff relied upon to explain why her signatures to the notes sued upon and those put in evidence by him as standards were not in the wife's ordinary handwriting. Held, that this evidence, although not admissible to show that the husband was his wife's general agent, was admissible for the purpose for which it was offered and admitted.

At the trial of an action against a husband and wife on certain promissory notes purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures offered by the plaintiff and admitted by the presiding justice as standards also were not in the wife's ordinary handwriting. The plaintiff introduced evidence tending to show that the signatures of the notes sued upon and of the standards were in the handwriting of a woman. It appeared that immediately after the notes sued upon were given the wife and her husband went to Europe. The wife offered to show by the testimony of her daughter in law that after the return of the wife and her husband from Europe the husband asked the witness to sign the name of his wife in a disguised handwriting to a subscription upon rights for shares of stock and that the witness refused to do it. The presiding justice excluded the evidence. Held, that the exclusion could not be said to be erroneous, because the justice well might have found that this was an independent fraud and have ruled on that ground that evidence of it was not admissible.

At the trial of an action against a husband and wife on certain promissory notes, amounting to \$32,000, purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures offered by the plaintiff and admitted by the presiding justice as standards also were not in the wife's ordinary handwriting. The plaintiff contended that the wife used a feigned signature to keep from her father the fact that she was

signing the notes. At the time that the notes sued upon were given the husband made an adjustment of transactions with the person to whom the notes sued upon were given for the sum of \$32,000 represented by them, and immediately after this adjustment the wife and her husband went to Europe. It appeared that about that time the husband had given to the same person sixty-seven notes purporting to be signed by his wife to the amount of over \$277,000, and it could have been found that the notes sued upon were among these. The wife testified that she never signed any of these notes and that her husband had forged her name upon them or had procured some one to do so. The wife offered to show by the testimony of her daughter in law that when she returned with her husband from Europe the husband asked the witness to keep from his wife any message or messages in regard to any promissory notes, and made other requests of a similar character, indicating a desire on his part that his wife "should not be informed of anything in connection with promissory notes." The presiding justice excluded the evidence, and after a verdict for the plaintiff the wife alleged exceptions. Held, that the exclusion was erroneous, because the jury might have found that the request of the husband to his wife's daughter in law had reference to the sixty-seven notes purporting to have been signed by his wife and had reference to some if not all of the notes sued upon, and this fact, if they should find it, was a material one which should be considered by the jury.

Two actions of contract upon certain promissory notes, described in the opinion, which were alleged to have been indorsed by the defendants Willoughby H. Stuart and his wife Susan M. Stuart. Writs in the Supreme Judicial Court dated September 17, 1904, and July 20, 1903.

The cases were referred to Arthur Lord, Esquire, as auditor. He filed a report in which he found for the defendant Susan M. Stuart in both cases. The cases first were tried together before *Morton*, J., who ordered verdicts for the defendant Susan M. Stuart, the defendant Willoughby H. Stuart making no defense. The plaintiffs alleged exceptions, which were sustained by this court in a decision reported in 201 Mass. 288. In that report the name of the plaintiff in the second case is stated as being the same as that of the plaintiff in the first case. That was an error. The plaintiff in the second case then was and now is the Newton Centre Savings Bank.

After that decision there was a second trial of the cases before *Sheldon*, J. The liability of the defendant Willoughby H. Stuart was admitted, but the defendant Susan M. Stuart denied that she signed or indorsed any of the notes or that she was liable upon them. The jury returned a verdict for each of the plaintiffs for the amount of the notes with interest; and the de-

fendant Susan M. Stuart alleged exceptions, raising questions as to the admissibility of evidence which are stated in the opinion.

- R. M. Morse, for the defendant Susan M. Stuart.
- W. M. Noble & T. W. Proctor, for the plaintiffs.
- LORING, J. These cases are before us on exceptions taken at the new trial consequent on the decision of this court in Newton Centre Trust Co. v. Stuart, 201 Mass. 288.
- 1. The first exception argued by the defendant is to the ruling of the presiding justice allowing the plaintiffs to show that Mrs. Stuart's father said in September, 1902: "That scoundrel [meaning the defendant's husband] has persuaded her to put her name to over \$100,000 worth of that paper, and I know it because she has told me so." We speak of Mrs. Stuart as the defendant because no contest has been made in these actions by her husband's guardian.

The two actions were on trial at the same time. The first action was on a note for \$12,000 dated July 27, 1901 (renewed by a note dated July 12, 1902), and the second action was on three notes, one for \$10,000 dated March 25, 1902, and two notes each for \$5,000 dated September 24, 1901, and January 1, 1902 (renewed by notes dated July 10, 1902, and July 12, 1902, respectively). All the notes purported to be signed by Mr. and Mrs. Stuart, were payable to their own order and purported to be indorsed by them. They were also indorsed by one Jewell who sold them to the plaintiff corporations before maturity. The defendant's husband had been committed as an insane person on September 20, 1902, and the defendant's contention was that her signatures on the face and back of these notes were forged by him. She testified that she knew nothing of them and had received nothing for them and that her alleged signatures had been made by her husband or some one procured by him.

It was found by the auditor that the defendant's husband had a series of transactions with Jewell between July 1, 1900, and July 19, 1901, when they were adjusted by a settlement in which the husband gave Jewell eight notes aggregating \$32,000 and a mortgage for \$30,000. And that between that date (July 19, 1901) and August 6, 1902, the husband gave Jewell sixty-seven notes purporting to be signed by the defendant to the amount of over \$277,000. It also appeared from the auditor's

report that in the spring of 1902 it was discovered that the defendant's husband, who was then the British consul in Boston, was short in his accounts to the amount of \$15,000. This amount was paid by the defendant's father, and he resigned or was discharged. It was under these circumstances that the plaintiffs were allowed to show by one of the defendant's witnesses that her father made the statement above set forth.

The statement was not admissible except under R. L. c. 175, § 66, and the presiding justice must be taken to have made the findings necessary under that act. There was no evidence that at the time the defendant's father made the statement the amount of notes which had been issued by the defendant's husband was known; and it is not likely that it was. A statement by the defendant under these circumstances that the husband had "persuaded her to put her name to over \$100,000 worth of that paper," without other evidence, warranted the inference that the defendant intended to include these notes. The presiding justice, "in admitting this evidence, stated to the jury that it was not of the remotest consequence and should not be considered unless the jury found, first, that Mrs. Stuart said this to her father, and second, that she intended it to include these notes." Guarded as it was, there was no error in admitting this testimony.

2. The second exception argued by the defendant is to the admission of various transfers of her shares of stock in the New York Central Railroad Company made by her from July, 1900, to May, 1902.

The statement of these transactions in the bill of exceptions is so meagre that if the question were to be decided upon it alone we should have to sustain this exception.

But the counsel for the defendant at the argument stated that the facts thus briefly referred to here are those set forth in the bill of exceptions before this court in *Newton Centre Trust Co.* v. *Stuart*, 201 Mass. 288. This was stated by the learned counsel for the defendant in order that the plaintiffs might have all that they ought to have in the decision of this exception.

It appears in the former bill of exceptions that the transactions in New York Central stock consisted in the defendant's selling her stock every quarter immediately after payment of the dividend and buying it in with borrowed money immediately before YOL. 208.

the next dividend was to be paid. It had been arranged between the defendant and her father that all such dividends should be sent to her in care of her father. When received by him they were turned over by him to her and indorsed by her to her husband, who cashed them and accounted to her for the proceeds. It was stated in the former bill of exceptions that this evidence "was [then] offered by the plaintiffs as evidence tending to prove general agency, and was excluded." It was decided in Newton Centre Trust Co. v. Stuart, 201 Mass. 288, that the exception taken to the exclusion of this evidence when offered for that purpose could not be sustained.

At the second trial this evidence was offered for a different purpose, namely, as part of a scheme which the plaintiffs relied upon as explaining why the signatures of the defendant to the notes sued on and the signatures, "about sixty in number," admitted by the court as standards or some of them were not in the defendant's ordinary handwriting. At the trial here in question the defendant testified that her father had wished her not to dispose of any property that he had given her. The plaintiffs' contention was that this manipulation of the New York Central stock and the use of a different signature in case of these notes was part of a scheme to conceal her financial transactions from her father. We are of opinion that it was competent for that purpose.

8. The fourth exception argued by the defendant was to the exclusion of the defendant's offer to show by Mrs. Erickson, the wife of the defendant's son, "that when Mr. and Mrs. Stuart returned from Europe in the summer of 1901," the defendant's husband "asked Mrs. Erickson to keep from Mrs. Stuart any message or messages in regard to any promissory notes, and made other requests of a similar character, indicating a desire on his part that" the defendant "should not be informed of anything in connection with promissory notes." And the fifth exception was to the ruling of the presiding justice by which he refused to allow the defendant to show by the same witness that after the return of the defendant and her husband spoken of above he asked her to sign the name of the defendant to a subscription upon rights for stock in a disguised hand, and that she refused to do it.

As to the second of these two exceptions we are of opinion that the presiding justice might well have found that this was an independent fraud and therefore not admissible in this case even though the plaintiffs had put in evidence that the signatures to these notes and to the standards were in the handwriting of a woman,

But the evidence which was the subject of the fourth exception stands on a different footing. The jury's decision depended upon which of two alternative views of undisputed facts was the true view of them. The facts which were not in dispute were that on July 19, 1901, the defendant's husband had an adjustment of his transactions with Jewell for the preceding year, in which the defendant's husband gave Jewell eight notes aggregating \$32,000. The first note sued on here is dated July 27, 1901. After this adjustment the defendant and her husband went to Europe. Just when they went and when they returned from Europe is not stated. The request to Mrs. Erickson which the defendant offered to prove was a request made "when Mr. and Mrs. Stuart returned from Europe in the summer of 1901." One of the original notes here sued on is dated September 24, 1901, and it does not directly appear that there was any note after July 27, 1901, earlier than the note dated September 24, 1901. It is stated by the auditor and does not seem to have been disputed that "between that date [July 19, 1901] and August 6, 1902, Stuart gave notes to Jewell, purporting to be signed by Mrs. Stuart, to the number of sixtyseven, and aggregating over \$277,000." It is apparent, or at least it could have been found, that the notes here sued on were among these \$277,000 of notes. The defendant's contention (and she so testified) was that she never signed any of these notes including the notes in suit, and never received a cent of their proceeds, and that her husband had forged her name to them or had procured some one to do so. In that connection there was evidence (apparently undisputed) that he had given Jewell a guarantee of payment of notes given by him to Jewell to the amount of \$166,635, to which were attached the forged signatures of the defendant and her two sons. It was the plaintiffs' contention that she did sign the notes sued on, using a feigned signature to these and the other notes to keep from her father the fact that she was signing the notes.

If the defendant had been in a position to prove that her husband had tried to keep and had succeeded in keeping from her during the whole period from September, 1901, to August 6, 1902, all knowledge of the fact that he had issued these notes purporting to be signed by her to the amount of \$277,000, including the notes here sued on, the jury could have found that the most likely explanation of that fact lay in the truth of the defendant's story and that there was no really adequate explanation of it if the plaintiffs' view of the undisputed facts was the true one.

The evidence which the defendant was in a position to offer fell short of that, but in our opinion it was of the same kind. The request made by the husband to Mrs. Erickson was made. or could have been found to have been made, immediately on the return of Mr. and Mrs. Stuart from Europe, where they went soon after July 19, 1901; for the offer was to prove a request made by the husband "after the return of Mrs. Stuart and himself in the summer of 1901." That is to say, it was made by the defendant's husband immediately before he began to give to Jewell notes purporting to be signed by the defendant to the amount of \$277,000. The fact which was offered to be proved was that it was immediately upon the return from Europe (where the defendant and her husband went immediately after the \$32,000 notes were given) and that it was immediately before the defendant's husband began to issue the sixty-seven other notes aggregating \$277,000 that he asked to have "any message or messages in regard to any promissory notes" kept from Mrs. Stuart, "and made other requests of a similar character, indicating a desire on his part that" the defendant "should not be informed of anything in connection with promissory notes." The jury would have been warranted in finding (if indeed they could have found otherwise) that this request, made at this time, had reference to the sixty-seven notes purporting to be signed by the defendant, aggregating over \$277,000, and that it had reference to some if not all of the notes here sued on. If they did find that these requests of the defendant's husband referred to some at least of the notes here sued on, it was a fact which had enough significance to require its admission. In our opinion it should have been admitted.

The entry must be

Exceptions sustained.



JOHN J. CURREN vs. MAGEE FURNACE COMPANY.

Suffolk. November 17, 1910. - March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Employer's liability, In a factory.

At the trial of an action against a furnace manufacturing company by an employee in its factory to recover for personal injuries alleged to have been caused by negligence of a superintendent of the defendant, there was evidence tending to show the following facts: The plaintiff was of mature years and experienced in his work, which was cleaning castings in a machine called a tumbler. The tumbler was revolved by the use of cog wheels on a shaft connected with the power by pulleys. It could be stopped, when in order, either by a lever operating a friction clutch or by another lever which disengaged the cogs. Both methods of stopping having got out of order, the plaintiff reported that fact to the superintendent, who summoned a machinist. The machinist reported that he could not do anything with the tools at hand or while the speed was on, and went away. The superintendent thereupon came to the machine with a stick of wood and without any other instruction or warning directed the plaintiff to "put that stick in there and stop" the machine. The plaintiff often had seen the superintendent stop a machine with a stick and always successfully and without injury. He took the stick, went into a narrow, dark and cramped place behind the tumbler and shoved the stick between the cogs as he had seen the superintendent do previously. The wood broke and his hand was injured. Held, that the questions, whether the superintendent was negligent and whether the plaintiff was in the exercise of due care, were for the jury.

Torr for personal injuries alleged to have been received, as stated in the opinion, while the plaintiff was employed in the defendant's furnace factory, and to have been caused by negligence of a superintendent of the defendant. Writ dated January 18, 1907.

In the Superior Court the case was tried before White, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked for a ruling that the action could not be maintained. The ruling was refused and there was a verdict of \$800 for the plaintiff. The defendant alleged exceptions.

H. E. Warner, for the defendant.

J. B. Dore, (T. F. McAnarney with him,) for the plaintiff.

RUGG, J. This is an action of tort in which an employee of the defendant seeks to recover for injuries alleged to have been

received through the negligence of its superintendent. following might have been found to be the facts. The plaintiff was of mature years and experienced in his work, which was that of cleaning castings in a machine called a tumbler. was an iron box into which castings were put through an opening in one side. On one end was a cog wheel about five feet in diameter, which connected with a smaller cog wheel, five or six inches in diameter, on a shaft in turn connected with a main shaft above by a driving pulley and belt. By means of a friction clutch the driving pulley could be made to take hold of the shaft on which was the small cog wheel, and thus the large wheel was revolved and with it the tumbler. This friction clutch was operated by a lever at one end of the tumbler. the opposite end was another lever by which the box could be moved forward, and thus the large cog wheel disengaged from There were thus two ways of stopping the tumbler, when both levers were working as designed. The friction clutch frequently became clogged with dust and oil and had to be cleaned. On the day in question the plaintiff tried to stop the tumbler, but neither lever would operate. He then reported that fact to one Williams, a superintendent, who sent him for a machinist. The latter came, but on inspection said he was unable to do anything with the tools at hand or while the speed was on, and he went away. Then Williams came to the machine with a stick of wood a foot long, three or four inches wide and one inch thick, and directed the plaintiff with an oath to "put that stick in there and stop" the machine, but without giving any further instruction as to how to do it. Thereupon, the plaintiff, without making reply, went behind the tumbler into a narrow and somewhat cramped place, where it was dark, although he could distinguish the cogs, and shoved the wood from beneath between the cogs of the two wheels, which broke the wood, and his hand was injured, because (as he said) he could not see where he put his hand or the wood. had seen Williams stop the machine in this same way before, but had never tried to do it himself.

There was enough evidence to require the submission to the jury of the question of the negligence of the defendant's superintendent. He gave direction to attempt to stop a heavy machine



loaded with iron castings by inserting a piece of wood between the rapidly revolving cog wheels, without any apparent exigency. Although the levers designed to disconnect the power did not work, there does not appear to have been any reason why the power shaft might not have been stopped temporarily or the machinist given time to return with other tools, which it might have been inferred he had gone to get from his statement that he could not stop the machine with those he first brought.

The point of difficulty is the due care of the plaintiff. care, as these words are employed in R. L. c. 106, § 71 (now St. 1909, c. 514, § 127), means that degree of care, which the ordinarily prudent man would use for his own safety in the light of all the circumstances at the time of the act under inquiry. That is the standard by which the plaintiff's conduct is to be judged. There is much to be said in support of the view that any reasonable man of experience ought to have known, that the direction of the superintendent was to do something manifestly dangerous, and that the perils of attempting to put a piece of wood between heavy gears in motion is too obvious to require discussion. Even though done in obedience to specific orders or under fear of losing one's employment, in the absence of any assurance from the superintendent, such an act cannot be treated as cautious or prudent, and risk of resulting injury is assumed. See for example Burke v. Davis, 191 Mass. 20; Wescott v. New York 4 New England Railroad, 153 Mass. 460; Lamson v. American Axe & Tool Co. 177 Mass. 144. But although the case is close upon this aspect, it does not appear on the whole to call for the application of this principle. The plaintiff was directed to do a definite act which he had often seen the superintendent do before, always successfully and without mishap. He was ordered for the first time to stop a machine, the usual devices for stopping which had failed to operate, in an extraordinary way, but without warning as to special danger. Knowing that the superintendent had done this before without harm, the plaintiff might properly assume that the direction did not involve exposure to injury. This example without comment or explanation might have been found to be in the nature of an assurance of safety. He was furnished by the superintendent with the piece of wood to use. The thing to be accomplished was so to place the wood as to

serve as a wedge between the cogs, and thus to "break the friction clutch apart" (as testified by the plaintiff) or to throw forward the wheel attached to the tumbler and thereby stop the machine. If the throwing apart of the two wheels was the result aimed at the success of the attempt might depend in considerable degree upon the length, thickness, grain and strength of the piece of wood used. As to this the plaintiff was not left to himself, but a certain stick was put into his hand by the superintendent for the purpose. Under all these circumstances we hesitate to pronounce the act of the plaintiff so clearly careless as to be incapable of being regarded as what a reasonably prudent man in his position might have done. Halley v. Nashua River Paper Co. 202 Mass. 164. Donovan v. Chase-Shawmut De Costa v. Hargraves Mills, 170 Mass. Co. 205 Mass. 248. 375. Manning v. Excelsior Laundry Co. 189 Mass. 231. Grace v. United Body called Shakers, 203 Mass. 355.

Exceptions overruled.

HENRY T. BARTOW vs. PARSONS PULP AND PAPER COMPANY.

Suffolk. November 18, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Agency, Agent's commission. Contract, Construction. Evidence, Relevancy and materiality. Practice, Civil, Conduct of trial: judge's charge, Exceptions.

Where, at the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it, and the defendant contended that no commission was due the plaintiff as to such undelivered merchandise because of the course of dealings between the parties and introduced evidence tending to show that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, the plaintiff should be allowed to testify as to peculiar facts regarding such previous occasions in order to rebut the inference which otherwise might be drawn from the fact that in those instances he did not receive his commissions.

At the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it.



and the defendant contended that no commission was due to the agent as to such undelivered merchandise because of the course of dealings between the parties, and introduced evidence that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, and the plaintiff's counsel, in questioning the plaintiff regarding one of such occasions, asked what were the "reasons" why he did not then claim a commission. In reply, the plaintiff stated in substance that the failure of the defendant to deliver the merchandise on that occasion was due to freight car complications which were no fault of the defendant's, and that he, the plaintiff, "told [the defendant he] need not ship it," and added, "Under the circumstances I thought it would be very poor taste on my part to demand a commission." The defendant excepted to the question and to so much of the answer as gave a "description . . . of opinions and feelings with regard to the facts," and the plaintiff's counsel stated that he was "willing to have such portions of the answer stricken out." The defendant made no motion for such purpose. Held, that under the circumstances the exceptions must be overruled although it was not accurate to ask for the plaintiff's "reasons," because so much of the answer as was incompetent the plaintiff had offered to have stricken out.

Where, at the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it and the defendant contended that no commission was due the plaintiff as to such undelivered merchandise because of the course of dealings between the parties and introduced evidence tending to show that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, and the plaintiff testified as to facts, which must have been known by the defendant and which, if believed, showed that the plaintiff's failure to receive commissions on the occasions in question did not affect his right to accept a commission for the sales which were the subject of the action, it is proper for the presiding judge to refuse to rule that "No reason of the plaintiff for not claiming commission on balances contracted for but not shipped is evidence unless accompanied by evidence that it is disclosed."

Where at a trial an exception was taken to about ten lines of the judge's charge and in this court the excepting party objected to only two of the ten lines, which appeared to be somewhat obscure although susceptible to a construction that made the instruction correct, and it did not appear in the bill of exceptions that the trial judge's attention was called at the close of the charge to the objection to the specific two lines, the exception cannot be sustained.

LORING, J. This was an action for \$527, the balance alleged to be due the plaintiff for a commission of \$1 a ton on a sale of one thousand tons of sulphite. No question has been made as to the plaintiff's employment by the defendant as his broker. The dispute between the parties is as to when the plaintiff earned his commission, the plaintiff's contention being that it was earned when the contracts were signed, while the defendant contended that it was not due until the sulphite was delivered. Two writ-

ten contracts were entered into between the defendant and the customer found by the plaintiff, each for five hundred tons of sulphite. Each of these contracts was made pursuant to a written report made by the plaintiff as a broker to the defendant as his principal, in which the statement of the proposed contract is followed by these words, "and \$1.00 per ton commission to me." The plaintiff testified that after a part of the sulphite had been shipped there was a dispute as to the quality of it, and shipments ceased.

Unless controlled by the course of dealings between the parties this statement in the plaintiff's report to the defendant as his principal meant that a commission of \$1 a ton was due to him for procuring the customer. Fitzpatrick v. Gilson, 176 Mass. 477. Willard v. Wright, 203 Mass. 406. Cohen v. Ames, 205 Mass. 186. Goodnough v. Kinney, 205 Mass. 203.

The right of the plaintiff to be paid his commission was not affected by his principal's failure to deliver the goods contracted for by him which the plaintiff's customer was ready to receive. Fitzpatrick v. Gilson, 176 Mass. 477. Monk v. Parker, 180 Mass. 246. Cohen v. Ames, 205 Mass. 186. Goodnough v. Kinney, 205 Mass. 208.

At the trial the defendant undertook to control the natural construction of the written agreement by showing that in case of three previous contracts procured by the plaintiff for the defendant the plaintiff had not received a commission on sulphite contracted for but not delivered. The plaintiff testified without objection that in the first of these three instances he claimed the commission but the defendant refused to pay it and he did not undertake to collect it because the amount of it was only He was then asked what were the "reasons" why he did not claim a commission in the second case. To this question the defendant excepted. The question was answered without the presiding judge's having made expressly any ruling upon its competency. The plaintiff in answer to it testified that in this instance when the customer wanted the sulphite the defendant could not make delivery because of a shortage in freight cars and when freight cars could be procured the customer did not want the sulphite, and "I told them they need not ship it." He added, "under the circumstances I thought it would be very poor taste on my part to demand a commission." The defendant excepted to that portion of the answer which gave a "description... of opinions and feelings with reference to the facts," and the plaintiff stated that he was "willing to have such portions of the answer stricken out." The witness without objection then testified that in the third instance his "reasons" for not asking for a commission on the five carloads of sulphite not delivered by the defendant was that he "asked them [the defendant] to cancel the other five cars."

The presiding judge refused to instruct the jury that "No reason of the plaintiff for not claiming commission on balances contracted for but not shipped is evidence unless accompanied by evidence that it is disclosed." To this the defendant excepted.

In his charge to the jury the presiding judge* said: "There has been some evidence in the case relative to the previous dealings between the broker and this defendant. That is competent evidence, and it has been admitted, at any rate, in this case as competent evidence, as having some bearing upon what was the business relation between this plaintiff and this defendant. It has no tendency to prove the actual facts that are involved in this case, but it has a tendency to show what the business dealings were between the parties and what may, perhaps, have been in their minds in making any agreement that was made and which is involved in this case." To this portion of the charge the defendant took an exception.

It was competent for the plaintiff to state the peculiar facts of the three instances in which he did not receive a commission on sulphite contracted for but not delivered, to rebut the inference which otherwise might be drawn from the fact that he did not receive a commission on undelivered sulphite in those instances. Allen v. Leonard, 16 Gray, 202. Walker v. Moors, 125 Mass. 852.

The exception to the question asked of the plaintiff concerning the second instance cannot be sustained. It was not accurate to ask for the plaintiff's "reasons"; but the evidence admitted was competent (Allen v. Leonard and Walker v. Moors, ubi supra), except the portion which the plaintiff offered to have

[·] Hitchcock, J.

stricken out. Under these circumstances the exception cannot be sustained. Plummer v. Boston Elevated Railway, 198 Mass. 499.

The ruling asked for, if given, would have misled the jury. It is manifest that the facts which were peculiar to the other three instances were known to the defendant. In addition the question was not a question of the plaintiff's "reasons" but of the facts peculiar to those instances.

The defendant complains of the words in the charge: "It has no tendency to prove the actual facts that are involved in this case." This part of the charge is somewhat obscure. We construe it to mean that the right of the plaintiff to a commission does not depend altogether on the previous dealings. And that was true. But the defendant did not call this portion of it to the attention of the presiding judge. See Shepley v. Henry Siegel Co. 203 Mass. 43, and cases cited. He took an exception to this portion of the charge as a whole. As a whole it was correct.

Exceptions overruled.

- R. D. Swaim, for the defendant.
- J. B. Studley, for the plaintiff.

GRACE S. CLOSE vs. JOSEPH B. MARTIN.

Suffolk. November 20, 1910. — March 3, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Equity Jurisdiction, Specific performance. Contract, Construction. Bond, Construction, To convey land. Deed, Acknowledgment, Recording. Agency. Waiver. Tender.

If one has agreed in writing to purchase certain land and to receive a quitclaim deed thereof, "conveying a good and clear title to the same free from all incumbrances, excepting restrictions of record, if any now in force and applicable, and taxes" for the current year, it is no defense to a suit in equity against him for specific performance of the agreement that he insisted upon a title which the owner's attorney would absolutely guarantee never would cause him trouble and that such guaranty was refused, since equity requires him to accept a title which is good only beyond a reasonable doubt.

In a suit in equity to enforce specific performance of an agreement in writing whereby the defendant agreed to purchase certain land from the plaintiff, the

following facts appeared: On an April 7 the owner of two parcels of land, one of which was the land in question, gave a bond conditioned upon the conveyance of the two parcels for \$7,000, of which \$2,000 was to be paid on the execution of the bond and \$5,000 was to be paid by the obligee's assuming an outstanding mortgage on the land, "the deed to be delivered within sixty days" from the date of the bond. It also was provided in the bond that the obligor reserved the right "to convey the premises to any person other than the obligee upon payment to him of the said sum of \$2,000 with interest . . . at any time within sixty days from the date of the bond." The parcel not in question was conveyed to the obligee by a deed dated the twenty-seventh of the same month, which was not recorded until the following August 9. On August 6 of the same year, by a deed recorded on the twentieth of that month, the parcel in question was conveyed to a predecessor in title of the plaintiff. The defendant contended that a defect in the title appeared in that the record did not show that the condition of the bond had been performed and that therefore he was warranted in refusing to perform his agreement. Held, that there was no defect, since the bond did not affect the obligor's right to convey the land away, but was merely an agreement to pay back the \$2,000, which had been paid on the execution of the bond, in case the obligor conveyed both parcels of land under the right reserved to him in the deed.

By the provisions of St. 1895, c. 460, nothing contained in St. 1894, c. 253, with regard to the recognition of the validity of the proof or acknowledgment of deeds and instruments in other States before any officer thereof authorized to take such acknowledgment, provided the authority of such officer is authenticated in a certain manner therein specified, should prevent the acknowledgment of such deeds or instruments in the form and manner lawfully used before the passage of that act or the recording of instruments so acknowledged, and therefore deeds regarding land in the Commonwealth, acknowledged in 1894 and 1898 before a justice of the peace in Maine in accordance with the requirements of Pub. Sts. c. 120, § 6, were entitled to be recorded and recognized here without having appended to them the authentication of the title of the acknowledging officer to his office which St. 1894, c. 253, required.

The owner of certain land agreed in writing to sell and convey it at noon on a certain day and at a certain place, free from all incumbrances, to one, who with the owner's assent employed to examine the title for him the attorney at law who he knew was acting for the owner in the transaction. The agreement also provided that the time and place for passing papers should not be changed "unless the parties hereto agree in writing to some other time and place." On the afternoon of the day before that appointed, the attorney found that he needed to examine a certain bond before coming to a conclusion as to the title, and he thereupon notified the owner that he need not attend at the time and place appointed. On the morning of the day appointed the attorney told the purchaser that he needed to see the bond. The attorney procured a copy of the bond in the afternoon of that day and tried in vain to reach the purchaser. The next morning he reported the title clear to the purchaser, who refused to accept a deed unless he could be "absolutely guaranteed" that there would be no trouble to him later because of the existence of the bond. Held, that the fact, that the attorney who was examining the title for the purchaser notified the owner, for whom he was acting in other matters regarding the transaction, that he had not finished his examination of the title and would not be ready to report upon it by the time set in the agreement, constituted a waiver by the purchaser of the requirement of a conveyance at that time, notwithstanding the

provisions of the contract requiring an agreement in writing for a change in such time.

Where by a contract in writing one agrees to accept a conveyance of certain land "free from all incumbrances," and thereafter refuses to accept such conveyance unless he is "absolutely guaranteed" that there would be no trouble to him later because of the existence of a certain bond, the requirement of a formal tender of a deed by the owner before the bringing of a suit in equity for specific performance of the contract is dispensed with.

BILL IN EQUITY, filed in the Superior Court on October 4, 1909, seeking the specific performance of an agreement in writing by the defendant to purchase land from the plaintiff, the agreement stating that conveyance was to be made "on or before September 30, 1909, by a good and sufficient quitclaim deed of . . . [the plaintiff,] . . . conveying a good and clear title to the same free from all incumbrances, except restrictions of record, if any now in force and applicable, and taxes assessed as of May 1, 1909."

In the Superior Court the case was heard by *Fessenden*, J. A commissioner was appointed under Equity Rule 85 to take the evidence. The facts are stated in the opinion. A final decree was entered, granting the relief sought by the plaintiff; and the defendant appealed.

The case was submitted on briefs.

- J. P. Prince, for the defendant.
- C. F. Choate, Jr., & F. H. Nash, for the plaintiff.

LORING, J. There is nothing in this appeal beyond the application of well settled principles of law to the particular facts of this case.

The plaintiff and defendant entered into a written contract by which the plaintiff agreed to sell and the defendant to buy a parcel of land therein described. The papers were to be passed in the registry of deeds at noon on September 30, 1909, "unless the parties hereto agree in writing to some other time and place." The plaintiff's attorney with the knowledge and consent of the plaintiff was employed by the defendant to examine the title, and the defendant knew that except for the examination of the title the attorney was to represent the plaintiff. The attorney found on the afternoon of September 29 that he wanted to see the terms of a bond for a deed, given in 1869, before coming to a conclusion as to the title. Thereupon he telephoned to the

plaintiff that she need not attend the next day unless she heard from him. On the morning of the next day (the day on which the papers were to be passed) he told the defendant that he wanted to see the terms of this bond before reporting on the title. The attorney got the copy of the bond in the afternoon of that day (September 30), and tried unsuccessfully to get the defendant on the telephone that afternoon. On the morning of the next day (October 1), he reported to the defendant that he "stood ready to pass the title." To this the defendant replied that unless he could be absolutely guaranteed that there would be no trouble to him later because of the existence of the bond he would not take the title.

When the defendant insisted upon a title which the attorney could absolutely guarantee never would cause him trouble, he asked for a better title than equity requires a purchaser to accept. A title which is good beyond a reasonable doubt is a title which equity requires a purchaser to take. First African Methodist Episcopal Society v. Brown, 147 Mass. 296. Martin v. Hamlin, 176 Mass. 180, 181.

The defendant now contends that the title is not good beyond a reasonable doubt because of the bond and because certificates are not appended to the acknowledgments of the two assignments made in Maine of the same mortgage.

The bond was a bond in the penal sum of \$2,000, and was dated April 7, 1869. It was conditioned upon the conveyance of two parcels of land, one of which was conveyed to the obligee by deed dated April 27, 1869, and recorded August 9, 1869, and the other (the land in question in the case at bar) was conveyed to a third person, a predecessor in title of the plaintiff, by a full warranty deed dated August 6, 1869, and recorded on August 20, 1869. It is recited in the bond that the obligor had sold the two parcels to the obligee for \$7,000 of which \$2,000 was to be paid down on the execution of the bond and the remaining \$5,000 was to be paid by the obligee's assuming an outstanding mortgage on the two parcels in the sum of \$5,000, "the deed to be delivered within sixty days herefrom." The condition also contained a reservation on the part of the obligor by which he was to have the right "to convey the premises to any person other than the said obligees upon payment to them

of the said sum of two thousand dollars with interest at the rate of per cent per annum at any time within 60 days herefrom."

Having in mind the fact that the agreement recited in the bond is one sale of both parcels for one price, and the further fact that the deed dated April 27 was not recorded until after the date of the second deed, it is fairly plain that what took place was this: The obligee was not in a condition to carry through his trade with the obligor for the purchase in question of the two parcels until he got some one to take the parcel which was not conveyed to him, and that he did not succeed in getting such a person until August 6, the date of the deed of the second parcel to the other person, and that said deed was made to the other person as the obligee's nominee and not under the right reserved to the obligor to convey to a third person. But however that may be, we are of opinion that by the true construction of it the bond was nothing more than an agreement to pay back the \$2,000 paid down on execution of the bond in case the obligor conveyed both parcels of land under the right reserved to him so to do in the deed, and that it did not affect the obligor's right to convey it away.

The other matter relied upon by the defendant as a defect is that in two instances assignments of the same mortgage (which mortgage was discharged by coming into the ownership of the owner of the equity of redemption) were acknowledged before justices of the peace in Maine, and no certificates were recorded in the registry of deeds showing that these men held that office. These assignments were made in 1894 and 1898. It was provided by St. 1895, c. 460, that nothing contained in St. 1894, c. 253, should prevent the acknowledgment of conveyances in the form and manner lawfully used before the passage of that act. Before the passage of that act it was enough that the deed, if acknowledged in another State, was acknowledged before a justice of the peace. Pub. Sts. c. 120, § 6. It was not necessary to append to the acknowledgment a certificate that the person taking it was a justice of the peace. It was proved at the trial that the persons in question were justices of the peace.

There is nothing in the other contentions of the defendant. The plaintiff's failure to attend at the registry of deeds on September 80 is not fatal to her case. The defendant's attorney



had not finished his examination of the title in time to report upon it at that time, and he notified the plaintiff on the day before that he would not be ready to report upon it at the time appointed and that she need not attend. That was a waiver. The fact that it was provided in the contract that the time for passing the papers should not be changed "unless the parties hereto agree in writing to some other time and place" did not prevent that. Bartlett v. Stanchfield, 148 Mass. 894. Goodhue v. Hartford Fire Ins. Co. 175 Mass. 187. The defendant's refusal to accept a good title dispensed with a formal tender.

Decree affirmed.

GEORGE V. LEVERETT & another, trustees, vs. MARY RIVERS & others.

Suffolk. November 30, 1910. — March 3, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Res Judicata. Devise and Legacy, Power. Power. Rule against Perpetuities.

- A finding of fact or a ruling of law as to the meaning of a provision in a will, made by a justice hearing a suit in equity and stated in a memorandum of his findings, does not become res judicata unless such finding or ruling is embodied in a decree.
- A testatrix, who died in 1859 leaving a son and two daughters, G., who then had a son and two daughters, and R., a spinster, by her will left one third of her estate to. her son for life with power to appoint such third " among my lineal heirs [meaning descendants], to have and enjoy the same upon such terms" as the son might prescribe. The testatrix's son died in 1875 and by his will appointed the estate in question to trustees for G. and R. during their respective lives, and, in case of the death of G. before R., to divide G.'s shares into as many portions as she had children at the date of the will making the appointment and also at the time of the son's death, to pay one third of such portion to a son of G. outright, and to pay to her two daughters respectively the income of their shares during their lives and on their deaths to pay the principal to and among such daughters' children and the issue of any deceased child by right of representation. A similar appointment to G.'s children and their issue was made of R.'s share on her death. S., one of G.'s daughters, at the time of the death of the testatrix's son had one child and later, by a subsequent marriage, had eight more children. Upon the death of S. the trustees under the appointing will filed a bill for instructions, and it was held that the will of the son of the testatrix operated as an effectual appointment of one third of the estate which was subject to the power to the nine children of S.

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LOBING, J. By her last will modified by a first and third codicil, Lydia Smith Russell left one third part of her estate to her son Jonathan for life without the intervention of trustees, with power in a contingency which took place to appoint his third "among my lineal heirs, to have and enjoy the same upon such terms" as he might prescribe. She died in 1859, leaving in addition to the son Jonathan a daughter, Geraldine, who was twice married, and Rosalie Russell who died a spinster. Jonathan died in 1875. By his will be appointed that part of his share of his mother's estate here in question to trustees in trust for his two sisters during their respective lives and in case Geraldine died before Rosalie (which event happened) to divide her share into as many portions as there should be children of Geraldine living at the date of his will and living at Geraldine's death; and to pay over to her son one third outright and to hold the portions set aside for daughters in trust to pay the income to the daughters for life, and upon the death of each daughter to transfer and convey that portion of the deceased daughter to and among her children and the issue of any deceased child (taking by right of representation) and upon the death of Rosalie to hold and pay over her half upon the same trusts. Geraldine left three children, George R. R. Rivers, Mary Rivers, and Rosalie G. Rivers who married Mr. Shields and later Mr. Sheffield.*

All Geraldine's children were born in the lifetime of Lydia Smith Russell, and the appointment to them for life and the appointment over as they should respectively decease is confessedly not too remote. *Dorr* v. *Lovering*, 147 Mass. 530. *Minot* v. *Doggett*, 190 Mass. 435.

The question which has to be decided arises from the fact that when Jonathan died Geraldine's youngest daughter Rosalie, then Mrs. Shields, had one child, and after Jonathan's death she married again and had eight more children; and the defendants other than these nine children of Mrs. Sheffield contend that the appointment over to the eight born after Jonathan's death is invalid.

^{*} On January 29, 1910, after the death of Rosalie Russell and of Rosalie G. Sheffield, the trustees under the will of Jonathan Russell filed this bill for instructions as to what disposition should be made of a fund approximating \$45,000 which they had held for the benefit of Rosalie G. Sheffield during her life. All the defendants admitting the allegations of the bill, Rugg, J., reserved the case upon the pleadings for determination by the full court.

This result is based on two contentions, namely: First, that it was so decided by a single justice in 1887, and second, that as matter of construction of Mrs. Russell's will the class among which Jonathan had a power to appoint was to be ascertained at his (Jonathan's) death. Neither contention is in our opinion well founded.

1. What gives rise to the first contention is the finding or findings made by a single justice in 1887, in a bill for instructions brought by the executors of Jonathan soon after his death in 1875. The question whether the contingency had happened on which Jonathan had a power of appointment seems to have occupied the first ten years next after the bill was brought. In 1885 a decree was entered declaring that the will of Jonathan operated as an effectual appointment of the residue of the fund for the lives of Geraldine (who had died while the suit was pending) and Rosalie. In addition the executors were directed to pay one half of the income then in their hands to the executor of Geraldine and one half to Rosalie; and further they were directed to transfer one half of the principal to certain trustees to hold for Rosalie for life, with liberty to any party to the suit to apply.

In 1887 the suit came on for hearing on the disposition to be made of the share of which Geraldine had the income for life. On the conclusion of this hearing four findings were made by the single justice who heard the suit.* At this time seven of the

^{* &}quot;1. In the above entitled suit in equity, I find that the words 'my lineal heirs' contained in the third codicil to the will of Lydia Smith Russell were used by the testator in the sense of 'my lineal descendants.'

[&]quot;2. I find that the class of persons among whom Jonathan Russell had by the will of Lydia Smith Russell power of appointing or disposing of his share under said will, included descendants or issue of said Lydia other than Geraldine I. Upton, and Rosalie Genevieve Russell.

[&]quot;3. I find that the death of the dones Jonathan was the time when the 'lineal heirs' of said Lydia were to be ascertained and determined, and that this class included at the time of the death of Jonathan all the lineal descendants of Lydia then living and that they were the following persons viz: Geraldine I. Upton, Rosalie G. Russell, Mary Rivers, George R. R. Rivers, Rosalie G. Shields (now Rosalie G. Sheffield) and Mary G. M. Shields.

[&]quot;4. I also find that the will of Jonathan Russell was a valid exercise of the power of appointment given to the said Jonathan by the will and codicils of Lydia S. Russell."

eight children born to Mrs. Sheffield after Jonathan's death had been made parties defendant to the bill. There seems to be a conflict between the finding "that the death of the donee Jonathan was the time when the 'lineal heirs' of said Lydia were to be ascertained and determined" and the finding "that the will of Jonathan Russell was a valid exercise of the power of appointment given to the said Jonathan by the will and codicils of Lydia S. Russell," at least if this finding is to be taken to be a finding on the gifts over after the life estates in Geraldine's daughters. And it is only on that assumption that the first contention of these other defendants is made. It is pretty plain however that all the findings of the single justice were intended to be findings on the validity of the life estates in Geraldine's two daughters. But however that may be, the only decree entered on these findings was a decree directing the executors to pay the principal of the two thirds of the portion of which Geraldine had the income during her life, to trustees in trust to pay the income thereof to Mrs. Sheffield's two daughters during their respective lives, leaving undecided the question of the gifts over after their deaths. The defense of res judicata is made out only when a judgment or decree has been made deciding the question which it is sought to try again. A verdict or finding on which no judgment or decree has been entered does not make a fact found in the verdict or finding res judicata. Oklahoma City v. McMaster, 196 U.S. 529. Hawks v. Truesdell. 99 Mass. 557. Burlen v. Shannon, 99 Mass. 200, 203.

2. The second contention of these defendants is "that the language used shows no intention on the part of Lydia Smith Russell that the class to which Jonathan had the power to appoint should be determined by any other rule than the general rule that the time for determining the members of a class who may benefit by the exercise of a power is the time of the death of the donee of the power where he has a life interest in the property. Farwell on Powers, (2d ed.) 490. Paul v. Crompton, 8 Ves. 375. Thayer v. Rivers, 179 Mass. 280, at p. 290." The short answer to that is that there is no such general rule. When a power is given to appoint among the lineal heirs (which in this case as matter of construction means descendants) of the testator there is no ground for confining it so as not to include any

lineal descendants however remote. See in this connection In re Veale's Trusts, 4 Ch. D. 61, 66; Thomas v. Lloyd, 25 Beav. 620. All that Mr. Farwell can be taken to have meant in his remarks relied upon by these defendants is that an appointment to issue of the donor of the power is not too remote if it is to vest on the death of the donee of the power. There is nothing in Paul v. Crompton and Thayer v. Rivers which helps these defendants.

A decree must be entered declaring that the will of Jonathan Russell operated as an effectual appointment of Mrs. Sheffield's one third of her mother's and her aunt's thirds, and directing the trustees to transfer and convey it to and among her nine children.

Decree accordingly.

H. K. Brown, for the plaintiffs, stated the case.

John Chipman Gray, (R. Ernst with him,) for the children of Rosalie G. Sheffield.

R. D. Ware, for other defendants.

HORACE CHASE vs. LEONARD H. PHILLIPS & others, trustees.

Suffolk. December 2, 1910. - March 3, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Equity Jurisdiction, Resjudicata. Res Judicata. Trust. Fraud. Husband and Wife. Words, "Died unmarried."

The determination, in a suit by the heirs of a certain woman against her husband seeking to annul for fraud the adoption by the woman of her husband's son by a former marriage, of the question, whether the adoption was procured by fraud and was void, by a final decree so declaring, renders that question res judicata in a suit by the husband on his own behalf and as administrator of his son's estate against trustees who held property for the benefit of the heirs of the woman, in which the plaintiff contends that he is entitled to the property because the adoption was not void.

If a married woman conveys certain property to trustees, directing among other things that on her death the property should be divided "precisely as if" she "had then died unmarried, intestate and possessed of said property in her own right," and four years later procures a divorce from her husband and a year later marries again, such conveyance is not void as in fraud of the second husband's marital rights.

A married woman conveyed certain property to trustees by a deed which contained, among directions as to the disposition of the property upon her death, the fol-

lowing: "it being distinctly understood that [her husband] is not to be included among her heirs-at-law, and that neither he nor his legal representatives are to receive upon [her] death any portion of said trust property, which upon her death is to be divided precisely as if [she] had then died unmarried, intestate and possessed of said property in her own right." Four years after the conveyance she procured a divorce and a year later married another man, who, upon her death, claimed a right under the trust as an heir at law, contending that the words "died unmarried," should be construed to mean "died unmarried to her first husband." Held, that the words should be given their natural meaning and that therefore the second husband had no rights in the trust fund.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 24, 1910, by Horace Chase individually and as administrator of the estate of De Forest Woodruff Chase against the trustees under the "Culliton Trust" and under the "Phillips Trust," so called.

The allegations of the bill in substance were as follows:

In 1884 Jeannie P. Culliton and her husband, William H. Culliton, conveyed certain real and personal property to the defendants and Daniel K. Phillips (since deceased) in trust, one provision of the trust (called the "Culliton Trust") directing the trustees, on the death of Jeannie P. Culliton, "to convey, transfer and deliver the whole of the trust property to her heirs at law, providing, however, that if the said William H. Culliton shall survive her, so much of the property described in [a designated] schedule as shall be amply sufficient to secure said annual income of eighteen hundred dollars, and not less in any event than sixty thousand dollars shall be retained by said trustees during his life, and upon his death the property so retained shall be conveyed, transferred and delivered to the same persons who received the residue of the property distributed at the death of said Jeannie P. Culliton, and in the same proportion; it being distinctly understood that the said William H. Culliton is not to be included among her heirs-at-law, and that neither he nor his legal representatives are to receive upon the death of said Jeannie P. Culliton any portion of said trust property, which upon her death is to be divided precisely as if the said Jeannie P. Culliton had then died unmarried, intestate and possessed of said property in her own right, first, however, deducting the proper expenses and charges of the trustees upon such termination of the trust."

The "Phillips Trust" was a trust under the will of the mother of Jeannie P. Culliton (afterwards Jeannie P. Chase) and con-



tained a provision that, as the children of the testatrix died, the trustees should give the property, as to each child, "to his or her lawful issue upon their arriving at the full age of twenty one years, and in the event of the death of any of my said children, without lawful issue living, or if living, and not arriving at the full age of twenty one years," to testatrix's other children.

In 1888 Jeannie P. Culliton obtained a divorce and in 1889 married the plaintiff and in the same year a joint petition of herself and the plaintiff for the adoption of DeForest Woodruff Chase was granted. Jeannie P. Chase died on September 13, 1905, leaving no children unless DeForest Woodruff Chase was such. DeForest Woodruff Chase died on December 19 of the same year.

The plaintiff demanded of the defendants that they turn the property held by them under both trusts over to him, and they refused.

The allegations of the tenth paragraph of the bill were that, on petition of those, "who but for said adoption would have been heirs and next of kin of Jeannie P. Chase, to revoke said decree of adoption, and on February 19, 1906, a decree purporting to revoke said decree of adoption was made by said Probate Court; that on appeal to a single justice of this court said decree was on June 28, 1909, affirmed; and that on November 28, 1909, on appeal to the full court, said decree was affirmed."

The allegations of the eleventh paragraph were that "when said decree purporting to revoke said decree of adoption was made both Jeannie P. Chase and DeForest Woodruff Chase were dead, and therefore said decree of revocation and said decrees affirming the same were made without jurisdiction in said courts and were null and void and of no effect and not due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States, and should be disregarded; and said decrees, if regarded and given effect according to their tenor, would deprive the complainant of his property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States."

The prayers of the bill were that the decree of the Probate Court described in the tenth and eleventh paragraphs of the bill be declared null and void for the reasons there stated; that the plaintiff be declared entitled to take under the Phillips Trust as administrator of the estate of DeForest Woodruff Chase "sole lawful issue" of Jeannie P. Chase; that he be declared to take under the Culliton Trust as administrator of DeForest Woodruff Chase, "sole heir at law" of Jeannie P. Chase, and individually as statutory heir at law of Jeannie P. Chase.

The answer admitted all the allegations of the first ten paragraphs of the bill, and denied those of the eleventh, reciting the circumstances of the suit there referred to, which are reported in 203 Mass. 556, and stating further that the plaintiff sued out a writ of error to the Supreme Court of the United States, alleging that by the revocation of the decree of adoption he was denied due process of law and his property was taken without due process of law in violation of the Constitution of the United States, and that a federal question was thus involved in the proceedings, that such alleged federal question was in truth without color of merit and accordingly, under the decisions of the Supreme Court of the United States, was not a genuine federal question, and that the plaintiff's writ of error was dismissed; and concluding with an allegation that the matters set out in the eleventh paragraph of the bill were res judicata.

The case was heard on the pleadings and an agreed statement of facts by Rugg, J. A final decree was entered dismissing the bill with costs. The plaintiff appealed.

R. Y. Fitz Gerald, for the plaintiff.

E. R. Thayer, (J. L. Thorndike with him,) for the defendants. Loring, J. The plaintiff in this case was the defendant in Phillips v. Chase, 203 Mass. 556. He has brought this bill against the defendants as trustees of certain property put in trust in 1884 by Mrs. Culliton (who later became Mrs. Chase), seeking to have them directed to hold that property in trust for him. The bill is also brought against the defendants as trustees of certain other property held by them under the will of Mrs. Chase's mother, and the plaintiff seeks to have them directed to hold in trust for him that portion of the property of Mrs. Chase's mother the income of which was payable to Mrs. Chase during her life. The basis of the plaintiff's claim in both cases is the same, namely: On Mrs. Chase's death her adopted son Woodruff Chase was her only heir and next of kin, and the



plaintiff is the only heir and next of kin of his son Woodruff. But the decree affirmed in *Phillips* v. *Chase*, 203 Mass. 556, decided that Woodruff Chase never was Mrs. Chase's heir. That question is res judicata between the plaintiff on the one side and Mrs. Chase's next of kin by blood on the other; and it is Mrs. Chase's next of kin by blood who are the persons beneficially interested in the trust property here in question if the plaintiff's claim through his son is not a good one. It is of no consequence that the plaintiff has brought the bill against the trustees alone, that is to say, without having joined as parties defendant those beneficially interested in the property. The next of kin by blood are the real parties defendant in the case at bar, and the doctrine of res judicata applies as much as if they were technically the parties and the only parties to this cause. See In re Defries; Norton v. Levy, 48 L. T. (N. S.) 703.

For that reason it is not necessary to consider the fact that the question decided in *Phillips* v. *Chase* was a question of status, as to which see *Hood* v. *Hood*, 110 Mass. 468.

This disposes of all the plaintiff's claim except his claim as statutory heir of his wife. This claim is confined to the first property mentioned above. By the terms of that trust this property was to be divided on Mrs. Chase's death "precisely as if said Jeannie P. Culliton had then died unmarried, intestate and possessed of said property in her own right." The plaintiff asks us to read into the agreement creating that trust after the word "unmarried" the words "to said Culliton," so that the agreement shall read "precisely as if said Jeannie P. Culliton had then died unmarried to said Culliton, intestate and possessed of said property in her own right."

The plaintiff's first contention is that if the agreement is construed literally it is void because in fraud of the plaintiff's marital rights. That contention cannot be maintained. This agreement was made in February, 1884. At that time Mrs. Chase was the wife of Culliton. She did not get a divorce from Culliton until June, 1888, and she was married to the plaintiff in January, 1889. Apart from the difficulties raised by the cases of Kelley v. Snow, 185 Mass. 288, and Leonard v. Leonard, 181 Mass. 458, it is plain that the agreement was not in fact made in fraud of the marital rights of the plaintiff.

His second contention is that the words used by Mrs. Culliton should not be given their natural meaning and he has sought to support this contention by citing a great number of cases, beginning with Maberly v. Strode, 8 Ves. 450, and ending with In re Brydone's settlement, [1903] 2 Ch. 84. These are cases in which the context has led the court to construe the words "die unmarried" to mean die a widow in place of die a spinster. The plaintiff especially relies on Clarke v. Colls, 9 H. L. Cas. 601, and goes so far as to say that it "covers our case exactly except that as a husband is here a direct heir he would come in as such in the first instance instead of through the child." That case may be taken as an example of the application to the case at bar of the cases cited by the plaintiff. Clarke v. Colls was the case of a marriage settlement of the property of the prospective wife, in which it was provided (in effect) that if her children did not inherit as therein provided the property should go as if she "had died possessed thereof intestate and unmarried." She died in giving birth to a boy and her son survived her one day. On her husband's death his legal representative claimed the property as the next of kin of the son. It was held that the words "as if she died intestate and unmarried" meant as if she died intestate and a widow, not as if she died intestate without having been married. This conclusion was reached for the reason that if she had survived her husband and had married again and had had children, the property would have gone to collateral kindred to the exclusion of her own children if the word "unmarried" were construed to mean without having had a husband. The result reached in that case was that the father took. and in the case at bar the plaintiff is trying to make out that he, the father, takes. But there is no other respect in which the two cases are alike. The father took there because his child took and it was held that it could not be assumed that a marriage settlement is intended to exclude the children of any marriage and give the property to collateral kindred. And again, what was done there was to construe the words "if she died intestate and unmarried" to mean if she died a widow. But this plaintiff is not now asking us to construe the words of this agreement in that way. So construed he does not take. What the plaintiff asks us to do is to construe those words to mean as

if she died unmarried to her first husband. This long array of cases does not help the plaintiff in that contention. All that they decide is that the context may show whether "die unmarried" means die a widow rather than die a spinster.

The context in the case at bar not only does not help the plaintiff in this contention of his but it affords additional reasons for not reading into the agreement the words he asks us to read into it. The whole of the clause relied upon by the plaintiff is in these words: "It being distinctly understood that the said William H. Culliton is not to be included among her heirs-atlaw, and that neither he nor his legal representatives are to receive upon the death of said Jeannie P. Culliton any portion of said trust property, which upon her death is to be divided precisely as if the said Jeannie P. Culliton had then died unmarried, intestate and possessed of said property in her own right." By the first clause Mrs. Culliton, as she was then, had provided that Culliton "is not to be included among her heirsat-law," and that "neither he nor his legal representatives are to receive upon the death of said Jeannie P. Culliton any portion of said trust property." The clause here in question presumably was inserted to add something to that provision. What Mrs. Culliton added was: "which [trust property] is to be divided precisely as if the said Jeannie P. Culliton had then died unmarried, intestate and possessed of said property in her own right." Culliton was excluded by the first clause. The second clause was to exclude all persons except those who would take if she died unmarried and intestate.

But in addition to that, construed in the light of Mrs. Culliton's experience in marrying Culliton, there is every reason to suppose that she wanted to arrange this property (as the words used by her say) so that it would not be an inducement to another man to marry her, that is to say, so that no husband would take it on her death.

The entry must be

Bill dismissed.

AUTOMATIC TIME TABLE ADVERTISING COMPANY vs. AUTO-MATIC TIME TABLE COMPANY.

Middlesex. December 5, 6, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Sale, When title passes. Practice, Civil, Exceptions. Payment. Pleading, Civil, Variance.

Under the provision of the sales act, St. 1908, c. 237, § 19, Rule 2, which does not change the common law, where a manufacturer of machines agrees in writing to sell twelve specific machines complete, and delivers six of them complete, retaining in his shop the remaining six in an incomplete condition for the purpose of completing them for delivery, the title to the six machines remaining in the shop does not pass to the buyer until they are completed, and if before completion they are damaged by fire the loss falls upon the seller.

Where by the statements in a bill of exceptions it appears that there was a contract to sell upon their completion specific goods which at the time of making the contract were incomplete, and that before the completion of the goods they were "greatly damaged" by fire, this does not bring the case within the provision of the sales act, St. 1908, c. 287, § 8, cl. 2, which applies only where the specific goods after the contract is made either perish or "so deteriorate in quality as to be substantially changed in character."

An allegation that a payment was made in cash is supported by proof that it was made by the setting off of mutual debts.

The payment of certain notes to the holder of them, at the request of a person to whom a cash payment is due from the person making the payment, is a payment in cash to the person to whom the cash payment was due.

CONTRACT for the alleged breach of a contract in writing in failing to deliver to the plaintiff six automatic time table clocks, operated by electric batteries, in accordance with the terms of the agreement printed below. Writ dated August 12, 1909.

The contract declared upon, of which a copy was attached to the declaration, was as follows:

"Know all men by these presents, that the Automatic Time-Table Company, a corporation duly organized, having its principal place of business at Lowell in the County of Middlesex and Commonwealth of Massachusetts, in consideration of \$4800.00, paid by the Automatic Time Table Advertising Company, a corporation duly organized, and having its principal place of business at said Lowell, in said County and Commonwealth, the receipt whereof is hereby acknowledged, does hereby grant, sell, transfer

and deliver unto the said Automatic Time-Table Advertising Company, the following goods, and chattels, viz., to wit:

"12 automatic time-table machines complete, together with all printed matter, time-tables, electro-plates, printed goods and advertising matter, and advertising contracts, relating to said machines which were sold, assigned and transferred to the said Automatic Time-Table Company by the said Automatic Time-Table Advertising Company under agreement, dated July 13, 1909. Said machines are described and located as follows.

"1 machine located at Merrimack Square, in Lowell, Mass.

- 1 " in Lawrence, Mass.
- 1 " " Haverhill, Mass.
- 1 " " Salem, Mass.
- 1 " " Lynn, Mass.
- 1 " " Chelsea, Mass.
- 6 machines now standing in the shop of the Automatic Time-Table Company, 58 Middle Street, Lowell, Massachusetts, and numbered on door on battery side of case, respectively as follows: — 8, 9, 10, 11, 12 and 18.

"The machines above described as located in Merrimack Square, Lowell, Mass., Lawrence, Haverhill, Salem, Lynn and Chelsea, Mass., include all parts and appliances that are now enclosed within or fastened upon their respective cases, and the machines now located in the shop at 58 Middle Street include Gordon batteries and all other essential parts in new and first-class condition that are now used in connection with the above mentioned machines.

"\$2400.00 of above consideration is allowed said Automatic Time-Table Advertising Company as a credit by value of demonstration.

"To have and to hold all and singular the said goods and chattels to the said Automatic Time-Table Advertising Company, and its successors and assigns to their own use and behoof forever.

"And the said Automatic Time Table Company hereby covenants with the said Automatic Time Table Advertising Company that it is the lawful owner of the said goods and chattels, and

that they are free from all encumbrances and that it has good right to sell the same as aforesaid, and that it will warrant and defend the same against the lawful claims and demands of all persons.

"In witness whereof the said Automatic Time Table Company has caused its corporate seal to be hereto affixed, and these presents to be signed in its name and behalf by Delmar G. Hurd, its Treasurer, this sixteenth day of July, 1909.

"Automatic Time Table Co.,
"Delmar G. Hurd, Treas."
(Seal)

In the Superior Court the case was tried before Hardy, J., without a jury. The defendant was engaged in the manufacture of machines known as automatic time table clocks, which were so constructed as to show the hour of departure of electric cars from the point where the clock was placed to the different destinations of such cars, and also were constructed in such a manner as to afford space wherein business or other advertising could be displayed, and the clocks were intended to be placed in the various street railway stations and other places where people congregated to become passengers on street railway cars. The defendant owned the patents for the manufacture of such machines and no other person could manufacture or sell them. The plaintiff was engaged in the business of securing contracts for the advertising upon such clocks.

The facts shown by the evidence are stated briefly in the opinion. Upon August 8, 1909, an accidental fire greatly damaged the six machines standing in the defendant's premises, and a dispute then arose between the parties as to whether there had been such a sale of these six machines as would vest the title in the plaintiff and subject the plaintiff to the damage thus occasioned to the six machines.

The defendant contended that by reason of the execution of the contract and its delivery to the plaintiff, the property in and title to the machines described in that instrument were conveyed by the defendant to the plaintiff, and that on the day of the fire the title to the machines in question was vested in the plaintiff. The plaintiff contended that the title to the machines remained in the defendant until the machines were completed and delivered, or were accepted, as provided for by the terms of the agreement of sale.

At the close of all the evidence the defendant asked the judge to rule as follows:

- "1. That proof of all the allegations pleaded in the plaintiff's declaration does not entitle the plaintiff to recover in this action.
- "2. Upon the pleadings and all the evidence in the case the plaintiff is not entitled to recover.
- "3. Upon all the evidence in the case the plaintiff is not entitled to recover."

The judge refused to make any of these rulings, and found for the plaintiff in the sum of \$2,471.20. The defendant alleged exceptions.

- N. D. Pratt, for the defendant.
- J. C. Burke, for the plaintiff.

LORING, J. The contract of July 16 was a contract for the sale of twelve specific machines and not a contract for the sale of twelve machines of a particular description. By its terms it purports to be a present sale, but it was a sale of "12 automatic time-table machines complete," and there was evidence that no one of the "6 machines now standing in the shop of the Automatic Time Table Company" was complete.

The bill of exceptions is somewhat obscure on this point. But as we interpret it there was evidence that apart from the Gordon batteries no one of these six machines was complete. We speak of the parts of the machine other than the Gordon batteries because it seems to have been the undisputed fact that as matter of practice these batteries were not put into the machines until they were set up for use on the premises of the purchaser or licensee, and setting up these machines on the premises of the plaintiff was not part of the obligation of the vendor under the contract here in question. It appeared that that was to be paid for by the vendee in addition to the purchase price named in the written contract.

The contract does not say that the "12 automatic time-table machines" were complete, but it says that the defendant sells to the plaintiff "12 automatic time-table machines complete." Evi-

dence that the six here in question were in fact incomplete was admissible as one of the circumstances under which the contract was made and so one of the circumstances in the light of which it was to be construed.

Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the six machines here in question did not pass on the execution of the contract. The transaction was governed by the sales act (St. 1908, c. 237), and it is there so provided in § 19, Rule 2. The rule was the same at common law. Wesoloski v. Wysoski, 186 Mass. 495, and cases cited.

The defendant contends that the cases of Glover v. Austin, 6 Pick. 209, Glover v. Hunnewell, 6 Pick. 222, Sumner v. Hamlet, 12 Pick. 76, Thorndike v. Bath, 114 Mass. 116, Mauger v. Crosby, 117 Mass. 330, and Whittle v. Phelps, 181 Mass. 317, are decisions to the contrary. Those are cases where it appeared that it was the intention of the parties to sell the chattel in its unfinished condition with an agreement by the seller to complete it; or, in the language of St. 1908, c. 237, § 19, those were cases where a different intention did appear.

The contract of July 16, therefore, was not a contract of present sale of six unfinished machines with an agreement on the part of the defendant to complete them, but it was a contract to complete the six unfinished machines which on completion were to become the property of the plaintiff.

The defendant has contended that the delivery of the six machines not in dispute passed the property in the six here in question, and that Damon v. Osborn, 1 Pick. 476, 481, Lee v. Kilburn, 3 Gray, 594, 598, and Rice v. Codman, 1 Allen, 377, are decisions to that effect. Those cases are not decisions to that effect, and the case of Foster v. Ropes, 111 Mass. 10, is a decision that that contention is wrong at common law. The rule of the common law is the rule under the sales act. The cases relied upon by the defendant do not help him. Damon v. Osborn was not a sale of specific goods. It was held there that goods bargained and sold would lie before a separation was made. See however Barrie v. Quinby, 206 Mass. 259. The sale in the case of Lee v. Kilburn was held to be a sale of specific goods where nothing remained to be done. It was held that as

against a messenger in bankruptcy the title passed without delivery and it was said that: "The taking possession of part was in legal effect, the taking possession of the whole." In *Rice* v. *Codman* the fact that part of the specific goods sold had been taken away was spoken of as showing that the statute of frauds had been satisfied.

The next contention of the defendant is that the fire of August 8 brought this case within St. 1908, c. 287, § 8, cl. 2, and that the plaintiff had to elect between avoiding the whole contract for all twelve machines or paying the whole price for the six the title to which passed to it at the date of the contract. It is not necessary to consider what the result would have been in the case at bar if the case had been brought within St. 1908, c. 237, § 8, cl. 2. The bill of exceptions went no further than to state that the "fire greatly damaged the six machines standing in the defendant's premises," and the statute applies where the specific goods perished after the contract was made or so greatly deteriorated in quality as to be substantially changed in character.

The learned counsel for the defendant misconceives the character of the action now before us when he contends that the plaintiff has not put himself in a position to sue on the footing that the contract is rescinded. This is not an action founded on the rescission of the contract of July 16, but it is an action on that contract to recover damages for the defendant's failure to complete the six machines which at the date of the contract were standing in its shop, and on completion of them to pass the title to the plaintiff.

The defendant's last contention is that there was a variance. The supposed variance consists in this: It is alleged in the declaration that the plaintiff paid the defendant \$2,400 in cash. The proof was that: "\$1,200 was allowed for capital stock in the defendant company previously issued to the plaintiff company, and paid for at the said price, which stock was then returned to the defendant company; \$1,000 was actually paid in assuming and paying a note of the defendant company then outstanding; \$151 was also allowed on account of another note also assumed and paid by the plaintiff company; \$48 was allowed on account of two advertising contracts the plaintiff company VOL. 208.

had outstanding which were assigned to the defendant company; and \$1 in money was actually paid when said instrument was signed." With the exception of the two notes assumed and paid by the plaintiff all these were cases of mutual debts set off by agreement and so payments in cash within *Breck* v. *Barney*, 183 Mass. 133. It is stated that the notes were "paid." We interpret that to mean that the plaintiff at the time of the execution of the contract paid those notes, at the defendant's request, to the holder of them. That was a payment in cash.

Exceptions overruled.

ALEXANDER MCL. GOODSPEED, trustee, vs. LOVE F. LAWRENCE.

Barnstable. December 7, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Dower. Husband and Wife. Wild Land.

Twenty-seven sea shore lots on or near the waters of Vineyard Sound, which belonged to a deceased husband, consisting of land which formerly was part of a pasture used for pasturing cattle during the summer months, and which, except for sale as cottage lots to be occupied during the summer season, have little value and are not productive of much, if any, income, can be set off as dower to the widow of the deceased and can be occupied and improved by her without committing waste, because they are not wild land in which she could not be entitled to dower within the meaning of R. L. c. 182, § 3.

APPEAL by the trustee under the will of Thomas H. Lawrence, late of Falmouth, the petitioner in a petition under R. L. c. 132, § 9, from a decree of the Probate Court for the county of Barnstable confirming the report of commissioners appointed to set off dower in the estate of the testator, by which there was set off to the respondent as his widow, who had waived the provisions of his will, twenty-seven lots of land in that part of Falmouth known as Falmouth Heights, two of the lots being described as on Grand Avenue and the remaining twenty-five lots as on Amherst Avenue, and the value of all the lots being appraised at the sum of \$1,100.

The case was heard by Braley, J., who found the facts which

are stated in the opinion and ruled as matter of law that the respondent was dowable of the lots set off to her by the commissioners. He ordered that the decree of the Probate Court confirming the report of the commissioners be affirmed, and at the request of the petitioner reported the case for determination by the full court. If the ruling was right, the decree of the Probate Court was to be affirmed; if the ruling was wrong, the decree of the Probate Court was to be modified accordingly.

The case was submitted on briefs.

A. McL. Goodspeed, trustee, pro se.

A. P. Worthen, for the respondent.

LORING, J. The sole question presented in this case is whether twenty-seven lots of land set off to the respondent as dower are wild lands within R. L. c. 182, § 8.

These twenty-seven lots, together with other similar lots of which the deceased died seised, were originally part of a large tract bordering upon or near the waters of Vineyard Sound which had been laid out for a summer resort and for that purpose restricted to dwelling houses, with some other incidental restrictions to make that restriction more effectual. his lots had been sold by the deceased during his lifetime. Since his death several have been sold for prices varying from \$250 to \$400 a lot. It was found by the single justice that "either sum is much in excess of their value for any other purpose than that for which they were designed, namely, the building of houses or cottages at the seashore for summer occupancy." The single justice further found that "Before the lots were laid out the land was part of a pasture which was used for pasturing cattle during the summer months for many years. At the time of the testator's death, and since, they have been unproductive of income and have not been cultivated for general farming purposes. I find, that except for sale as cottage lots, to be occupied during the summer season, they have little value and are not productive of much, if any income, but I am satisfied that the widow could occupy these lands without committing waste, and that they are very valuable for the purposes already described."

The provisions of the statute now contained in R. L. c. 182, § 3, originated in Rev. Sts. c. 60, § 12. They were then enacted, as we are informed by the commissioners (Commissioners' Re-

port, note to c. 60, § 12), "in conformity with these [previous] decisions, and in order to make the statute law complete and clear." These previous decisions established (1) that dower was to be assigned with reference to the annual rents and profits and not by taking one third in quantity of the land of the deceased (Leonard v. Leonard, 4 Mass. 533); (2) that there was no reason for allowing a widow dower in wild land, by which was intended woodlands, for it was useless unless improved by cutting the timber, and if the widow cut the timber she would forfeit her estate for waste; Conner v. Shepherd, 15 Mass. 164; but (3) the widow was entitled to have dower in woodland used by the deceased as an appendage to his dwelling house for the purpose of procuring fuel and timber for repairs because a widow has no right to fire bote, etc., without an assignment of dower in the White v. Willis, 7 Pick. 148. White v. Cutler, 17 wood lot. Pick. 248.

The finding of the single justice that the widow can occupy the lands here in question without committing waste does not mean, as the appellant contends, that the widow can occupy but cannot improve these lots without committing waste. It is plain that they can be improved without committing waste, and that the single justice so found. It follows that they are not wild land within R. L. c. 132, § 8; and the entry must be

Decree affirmed.

FREDERIC PARKER & another, executors, vs. RUTH H. COBE.

Suffolk. December 7, 1910. — March 3, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Devise and Legacy. Annuity. Interest. Equity Pleading and Practice, Parties.

A bequest of \$75,000 to trustees "to be used to purchase an annuity or annuities for C., my niece, the payments thereof to be paid to her quarterly, if that can be done," gives the niece the right to receive the money outright and to require that no annuity shall be bought.

Where there is a bequest of a sum of money to trustees "to be used to purchase an annuity" for a certain person, and the beneficiary requires that the money

shall be paid to him outright without the purchase of an annuity, interest on the amount of the bequest should be paid to the beneficiary from the expiration of one year from the death of the testator.

In a suit in equity by the executors of a will for instructions as to a bequest of a sum of money to them as trustees "to be used to purchase an annuity "for a certain person, where the beneficiary has demanded that the money shall be paid to him outright without the purchase of an annuity, and he is entitled to have this done, and where it affirmatively appears that no question is made as to the interest to be computed upon the sum to be paid to the beneficiary, the residuary legatees under the will have no possible interest in the matter passed upon and there is no occasion for making them parties defendant.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 28, 1910, by the executors of the will of Herbert F. Hanson, late of Boston, against Ruth H. Cobe of Chicago in the State of Illinois for instructions as to a clause of the will relating to the defendant.

The bill alleged that the defendant was one of the beneficiaries named in the will; that at the time of the death of the testator she was a minor, and that one Ira M. Cobe of Chicago was appointed her guardian both in the State of Illinois and in this Commonwealth; that the will was dated December 2, 1905, and was admitted to probate on March 12, 1909, and that, after providing for the payment by the executors of the charges against his estate, the testator provided as follows:

- "I devise all the remaining property, real, personal or other kind, of which I shall die possessed or which shall come to me after my decease to Frederic Parker and John A. Ordway, Jr., both of said Boston, in trust to sell, invest and re-invest, and to pay to my mother each year during her life five thousand (5000) dollars, using therefor the income of the property and any part of the principal they shall deem proper, and when in any year the income exceeds five thousand (5000) dollars to pay the excess during such year to the extent of the income from seventy-five thousand (75,000) dollars to Ruth H. Cobe, my niece.
- "I devise to be paid at the death of my mother, or at my death, if my mother be not then living:
- "1. Seventy-five thousand (75,000) dollars to be used to purchase an annuity or annuities for Ruth H. Cobe, my niece, the payments thereof to be paid to her quarterly, if that can be done."

The bill further alleged that the testator's mother died before

the testator; that the plaintiffs had paid all the debts of the testator that had been brought to their attention for which they considered the estate liable; that the plaintiffs were ready and willing to expend the sum of \$75,000, less such an amount as might be due to the Commonwealth of Massachusetts for the legacy and succession tax, in the purchase of an annuity or annuities for the benefit of the defendant, payable to her as in the will directed; but that the defendant refused to accept the annuities given to her under the will, and demanded that \$75,000, together with interest thereon from the date of the decease of the testator, should be paid her outright without its having been invested in any contract for an annuity or annuities and without any obligation being put upon the defendant so to invest it, to become her own property absolutely and without condition or incumbrances.

The plaintiffs asked for instructions as to whether (1) the defendant was entitled to the payment to her of \$75,000 outright as a legacy; (2) whether if the court found that this sum should be paid to the defendant outright, she was entitled to interest thereon, and if so from what date, and whether the interest should run at the legal rate or at a rate equal to what the fund actually had earned, and (3) whether it was the duty of the plaintiffs to purchase an annuity or annuities payable to the defendant, to be free from any incumbrances, conditions, and restraints upon alienation of the defendant's rights and interests therein, or whether they had the right to purchase annuities payable to the defendant, incumbered with restrictions as to her right to assign or negotiate her rights and interests therein.

The case came on to be heard before Rugg, J., who reserved it on the pleadings for determination by the full court.

Later a petition was filed, by leave of court, by the residuary legatees under the will of Herbert F. Hanson, praying that they might be allowed to appear and become parties defendant. The petition was allowed, and the petitioners filed an answer admitting all the allegations of the bill except the allegation that the defendant Ruth H. Cobe was the only person interested therein. Thereupon the petitions and the answer of the petitioners were reserved by *Braley*, J., for determination by the full court.

- A. A. Folsom, (H. M. Burton with him,) for the plaintiffs, stated the case.
 - W. M. Noble, (H. R. Morse with him,) for the defendant.
- F. K. Linscott, for the residuary legatees under the will of Herbert F. Hanson, submitted a brief.

LORING, J. It is the settled law of England that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money and he can insist that the annuity shall not be bought. Yates v. Compton, 2 P. Wms. 308. Barnes v. Rowley, 8 Ves. 305. Bayley v. Bishop, 9 Ves. 6. Dawson v. Heary, 1 Russ. & M. 606. Kerr v. Middlesex Hospital, 2 DeG., M. & G. 576. Ford v. Batley, 17 Beav. 303. Stokes v. Cheek, 28 Beav. 620. In re Mabbett, [1891] 1 Ch. 707. In re Robbins, [1907] 2 Ch. 8. For further cases see 2 Am. & Eng. Encyc. of Law, (2d ed.) 399. In the United States there is a decision to the same effect by an inferior court (Reid v. Brown, 106 N. Y. Supp. 27), and, so far as we know, no case to the contrary.

This rule has found its most frequent application in case of bequests to be laid out in the purchase of annuities. But it is a general rule applicable to a bequest to be laid out in the purchase of any object. See for example Barlow v. Grant, 1 Vern. 255; Nevill v. Nevill, 2 Vern. 431; Barton v. Cooke, 5 Ves. 461; Lonsdale v. Berchtoldt, 3 K. & J. 185.

The reasoning on which the rule is established is that the legatee can sell the particular object as soon as it is bought and the law will not require the performance of a nugatory act. Consequently it is of no consequence that the particular object is to be bought by the executor and not by the legatee. See for example Dawson v. Hearn, 1 Russ. & M. 606; Ford v. Batley, 17 Beav. 803; Stokes v. Cheek, 28 Beav. 620; In re Robbins, [1907] 2 Ch. 8; In re Brunning, [1909] 1 Ch. 276; Reid v. Brown, 106 N. Y. Supp. 27.

The case at bar is not a case where \$75,000 was left upon the trust that the income of it should be paid to Ruth H. Cobe during her life, but it is a case where the \$75,000 was to be laid out by trustees in the purchase of an annuity for Ruth H. Cobe during her life. For that reason it is not a case within the rule of Claflin v. Claflin, 149 Mass. 19.

The \$75,000 was to be laid out in the purchase of an annuity

in the case at bar by trustees and not by executors. In our opinion that makes no difference. Where the only duty to be performed by a trustee is to buy a particular piece of property for the cestui que trust, which piece of property the cestui que trust can sell as soon as it is bought, the rule of a bequest for a particular object applies and the cestui que trust is entitled to the money. The purchase is as much a nugatory act in case of a trust as it is in case of a bequest, and the same rule governs both cases.

We are of opinion that interest should be paid on the \$75,000 from the expiration of one year from the testator's death, under the usual rule, as to which see *Thayer* v. *Paulding*, 200 Mass. 98, 100 (where the cases are collected) and *Claftin* v. *Holmes*, 202 Mass. 157. The bequest in the case at bar was a bequest of \$75,000 to be laid out in the purchase of an annuity, not the bequest of such sum as would purchase an annuity of a specified annual amount, as was the case in *In re Robbins*, [1907] 2 Ch. 8, where it is held that the annuity began at the death of the testator.

The question decided in the case at bar was a question between Ruth H. Cobe and the executors. The only possible interest which the residuary legatees could have had in the matter was in the payment of interest on the \$75,000. It affirmatively appears that there was no difference between them on that point. There was no occasion for making them parties defendant.

A decree should be entered directing the plaintiffs to pay to Ruth H. Cobe \$75,000 with interest from the expiration of a year from the death of the testator.

So ordered.

WILLIAM A. GASTON, trustee, vs. ISAAC GORDON.

Suffolk. December 8, 1910. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Contract, Construction, Validity, In writing. Landlord and Tenant. Evidence, Extrinsic affecting writings. Practice, Civil, Ordering verdict.

A contract in writing, which reasonably can be performed in such a way as to violate no law, will not be held to be invalid because it can be performed in such a way as to commit a criminal offense, especially where it contains a provision that no unlawful act shall be performed.

In an action to recover rent upon a covenant in a lease, it appeared that the lease contained elaborate provisions defining the rights of the respective parties, and contained a covenant on the part of the lessee that he would use the premises solely for the retail liquor business and would not use them for any other purpose, that the defendant failed to obtain a license for the sale of intoxicating liquors on the premises, and thereupon gave notice to the plaintiff, and refused to occupy the premises or to pay rent, contending that it was an implied condition of the lease that the lessee should be able to procure a license, and that if he failed to do so upon a proper application he was not bound by the lease. Held, that no such term of the lease was to be implied, that the defendant's obligation to pay rent was an absolute one, and that he was not excused from his obligation by the refusal of a public board, for whose action the plaintiff was in no way responsible, to act favorably on the defendant's application for a license.

In an action on a covenant to pay rent contained in a lease in writing, evidence of conversations between the plaintiff's agent and the defendant in regard to the terms and conditions of the lease, which took place before its execution, is not admissible to vary the unambiguous terms of the instrument.

In an action on a covenant to pay rent contained in a lease in writing, where the execution and delivery of the lease are admitted and it appears that the defendant refused to pay rent in accordance with its terms without any just ground for such refusal, the only correct conclusion possible as matter of law is that the plaintiff is entitled to recover, and a verdict for the plaintiff should be ordered.

CONTRACT for rent upon a covenant contained in a lease in writing of a store numbered 591 on Washington Street at the corner of Avery Street in Boston. Writ dated September 8, 1908.

The provisions of the lease are described in the opinion. The defendant's answer, in addition to a general denial, contained the following:

"And further answering the defendant says that, if he ever executed the lease a copy of which is annexed to the declara-

tion, it was provided in said lease that he should use the said premises solely for the retail liquor business; that said premises could not lawfully be used for said business without a license for the sale of intoxicating liquors; that the defendant was unable to obtain such license, and therefore could not carry out the provisions of said lease without violating the laws of the Commonwealth; that the defendant requested the plaintiff to allow him to use the premises for other purposes not unlawful which the plaintiff refused to do; that the performance of said lease by the defendant therefore became unlawful and the defendant was not bound by said lease, and has never occupied the premises described therein.

"And further answering the defendant says that if he ever executed said lease, the same was executed upon the condition that he should be able to procure a license for the sale of intoxicating liquors upon the premises described therein; that he endeavored to obtain such license but the same was refused him; that thereupon said lease became void and of no effect.

"And further answering the defendant says that if he ever executed said lease, the same was in violation of the laws of this Commonwealth relating to the sale of intoxicating liquors, and was therefore unlawful and void."

In the Superior Court the case was tried before Lawton, J. At the close of the evidence the counsel for the plaintiff moved to strike out as immaterial so much of the defendant's testimony as related to conversations between one Townsend, who was the agent of the plaintiff, and the defendant with regard to the subject matter of the lease before the signing of the lease. judge ruled that these conversations were admitted improperly and were incompetent and immaterial, and ordered that the defendant's evidence relating to them should be stricken out. The defendant excepted. This evidence being stricken out, and it being agreed that there was no conflict in the evidence as to the other facts of the case, and the counsel agreeing that, if the plaintiff was entitled to recover the rent, he was entitled to receive \$2,589.66, the judge ruled that upon the whole evidence and the pleadings the plaintiff was entitled to a verdict for that amount, and ordered a verdict for the plaintiff in the sum named. The defendant alleged exceptions.

- J. M. Gibbs, for the defendant.
- T. Hunt, for the plaintiff.

RUGG, J. This is an action of contract to recover rent reserved in a written lease. The facts are not in controversy. The defendant, hoping to secure a license to sell intoxicating liquors upon the demised premises, executed with the plaintiff under date of November 15, 1907, a lease for a term of three years from February 1, 1908, which contained a covenant that he would "use the said premises solely for the following purposes, - for the retail liquor business" and would not "use said premises or any part thereof for any purpose other than those stated in this lease, nor for any purpose . . . which shall be unlawful . . . or contrary to any law, ordinance or by-law." In the latter part of 1907 an application for a license for the sale of intoxicating liquors on the premises was made by the defendant to the licensing board, and it was refused. Thereupon the defendant gave notice to the plaintiff, did not enter into occupation under the lease, and refused to pay rent.

1. This action is defended chiefly on the ground that the lease on its face requires something to be done, which is illegal unless a license was granted, and that as this was refused the plaintiff cannot recover. If this objection is well founded the plaintiff cannot recover, for it is elementary that a contract which cannot be performed without violating the law is void. The lease is explicit that the lessee will use the premises solely for the liquor business. This is equivalent to an express stipulation that he will use them for nothing else. This business when licensed according to the provisions of the statute is recognized by law as legal. It was possible in the nature of things lawfully to comply with all the stipulations of the lease. It is an implied condition of all contracts that they shall be lawfully performed. Where it is possible to execute their terms in different ways, one of which is permissible and the other prohibited, it will be presumed as a general rule in the absence of evidence to the contrary that both parties intended that it should be executed according to law. A contract will be treated as binding when it can reasonably be performed in such way as to violate no law, and will not be regarded as void, because, among others not objectionable, one way is open for so executing it as to contravene some criminal statute. Shedlinsky v. Budweiser Brewing Co. 163 N. Y. 437. Waugh v. Morris, L. R. 8 Q. B. 202, 208. Tayler v. Chichester & Midhurst Railway, L. R. 4 H. L. 628. Newby v. Sharpe, 8 Ch. D. 39. There is in this lease the further provision that there shall be no unlawful use of the premises. This confirms the implication to this effect which the policy of the law reads into every contract. There is therefore not only nothing to indicate that the parties in executing this lease contemplated any unlawful use, but the clear statement to the effect that they did not.

2. The defendant contends that it is an implied condition of the entire lease that the lessee shall be able to procure a license, and if he fails he shall not be bound. It is plain from the lease that the premises can be used for nothing else than the liquor business, except with the assent in writing of the lessor. It follows that without a license the lessee can make no use of them, except by consent of the lessor. Steward v. Winters, 4 Sandf. Ch. 587. Spalding Hotel Co. v. Emerson, 69 Minn. 292. Maddox v. White, 4 Md. 72. Wertheimer v. Wayne Circuit Judge, 83 Mich. 56, 62. There is nothing about the lease to raise the inference that the parties intended it to be subject to an implied condition that the defendant should procure a license. On the contrary, there is much to lead to the opposite conclusion. It is elaborate in all its details. It expresses the rights of the parties in the event of damage to or destruction of the property by fire or unavoidable casualty or its taking by eminent domain, and for the possible termination of the lease under these circumstances. also a stipulation as to its termination in the event of bankruptcy, insolvency or assignment for benefit of creditors by the lessee, and by notice in writing at any time after January 31, 1910. The lease seems to be a studied effort to put into written phrase every consideration which was a part of their agreement. It was apparently an intelligent attempt to express their contract in such a way and with such fulness that nothing could be left uncertain. It must have been within the thought and contemplation of the parties that the lessee would be obliged to get a license not only once but each year of the term of the lease in order to make the required use of the premises. The lease binds the heirs, the assigns and legal representatives of both the lessor

and the lessee. Yet it is plain that if a license had been granted to the lessee, it is such a personal privilege that, had he died before its expiration, it would have been extinguished, and the liquor business could not have been carried on except under a new license. But by the express terms of the lease rent would still have been due. The inference is unavoidable that if it had been intended to make this whole instrument dependent upon the granting of a license to the lessee, a clause to that end would not have been omitted. The lessee has bound himself in unmistakable language to pay the rent without any qualification dependent upon his failure to obtain the necessary authority from public officers. Although this mischance renders it impossible for him to make the valuable use of the property which was contemplated, that was a contingency which ought to have been foreseen, and some anticipatory provision of partial or entire exoneration from liability inserted in the lease if such was the intention of the parties. There appears to be no more reason to imply such condition in this lease than to say that the burning of a building ends a lease of land and buildings. Yet nothing is better settled in the law of landlord and tenant than that, in the absence of special stipulation, there is no abatement of rent in case a building upon leased premises is ruined by fire. Fowler v. Bott, 6 Mass. 63. Davis v. Alden, 2 Gray, 309. Roberts v. Lynn Ice Co. 187 Mass. 402, 407. The reason for this rule is that an express and unqualified obligation voluntarily incurred ought to be enforced. Casualties not provided for in such a contract must be presumed to have been omitted intelligently and intentionally. The fact that by reason of the refusal of the public board to act favorably to the defendant, for which the landlord is in no wise responsible, the value of the estate to the tenant has been greatly diminished, will not excuse him from performing what is required of him. Pratt v. Grafton Electric Co. 182 Mass. 180. Houston Ice & Brewing Co. v. Keenan, 99 Texas, 79. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co. 188 Ga. 776.

3. The testimony of conversation occurring before the execution of the lease between the plaintiff's agent and the defendant, so far as not wholly immaterial, was properly excluded, under the familiar rule that when parties have put their contract in writing in unambiguous terms, previous or contemporaneous con-

versations or agreements respecting the same subject are inadmissible to vary its terms. The writing is conclusively presumed to express the contract. Mears v. Smith, 199 Mass. 319. Commonwealth Trust Co. v. Coveney, 200 Mass. 379. Butterick Publishing Co. v. Fisher, 203 Mass. 122, 132. Perry v. J. L. Mott Iron Works Co. 207 Mass. 501. Jennings v. Puffer, 203 Mass. 584.

4. The execution and delivery of the lease being admitted, there was no question of fact to be submitted to the jury. This is not a case where different inferences might have been drawn from undisputed facts. The only correct conclusion possible as matter of law was that the plaintiff was entitled to recover. Hence the verdict was rightly directed.

Exceptions overruled.

COBB, BATES AND YERKA COMPANY vs. WILLIAM HILLS, JR.

Suffolk. January 2, 1911. - March 3, 1911.

Present: Knowlton, C. J., Loring, Bealey, Sheldon, & Rugg, JJ.

Sale. Evidence, Materiality, In rebuttal. Witness, Cross-examination. Practice, Civil, Conduct of trial, Exceptions. Estoppel.

- In an action for the price of goods sold, where on the undisputed evidence it appears that there was a completed sale and that the title to the goods passed to the defendant, and the only question is whether the price was payable in money or in goods, on which the evidence is conflicting, it is right for the presiding judge to refuse to instruct the jury that they must find for the defendant.
- Where a party who has called the adverse party as a witness proceeds to cross-examine him, as permitted by R. L. c. 175, § 22, the regulation of the scope to be allowed in such cross-examination, as well as the order of evidence, is within the discretionary power of the presiding judge.
- In an action for the price of goods sold and delivered, where there is no dispute as to the amount finally agreed upon by the parties as the price and the only question is whether that price was to be paid in money or in other goods, it is proper to exclude as immaterial evidence that the defendant offered to the plaintiff's broker or to other persons a price less than that which he ultimately agreed to pay.
- In an action for the price of goods sold, where on the undisputed evidence it appears that the title to the goods had passed to the defendant and the only question on conflicting evidence is, whether the price was to be paid in money or in other goods to be selected by the plaintiff from the defendant's stock on hand, which the plaintiff had not done, if the presiding judge instructs the jury that if

the payment was to be made in merchandise the plaintiff cannot recover, the defendant cannot be harmed by the exclusion of evidence offered by him to prove the prices at which he was selling his own goods.

Where a plaintiff calls the defendant as a witness and cross-examines him as permitted by R. L. c. 175, § 22, this does not estop him from introducing evidence in rebuttal to contradict the testimony of the defendant which he elicited in the cross-examination.

CONTRACT upon an account annexed for \$1,018.73 with interest from January 16, 1910, when payment was demanded, the account containing a single item for the sum named as the price of sixty-two bales of Grenoble walnuts, containing thirteen thousand five hundred and eighty-three pounds at seven and one half cents a pound. Writ dated May 20, 1909.

The defendant's answer, after a general denial, contained the following: "And further answering the defendant denies that he bought the merchandise set out in the account annexed to the plaintiff's declaration, but says that it was a barter trade and that the plaintiff agreed to take from the defendant in exchange other merchandise to be selected by the plaintiff from the defendant's stock, and the defendant says that he is and has at all times been ready and willing to deliver to the plaintiff its selection and has so notified the plaintiff, but the plaintiff refuses to select and receive any merchandise in exchange and demands a cash payment."

In the Superior Court the case was tried before Lawton, J. The questions that arose as to the admissibility of evidence are described sufficiently in the opinion. At the close of the plaintiff's evidence the defendant asked the judge to give certain instructions to the jury, of which the seventh was, "That upon all the evidence the plaintiff has not sustained the burden of proof and the jury must find for the defendant." The second and fifth instructions requested by the defendant have been made immaterial by the decision of this court that they were given in substance.

The judge submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,100.85. The defendant alleged exceptions to the refusal of the judge to give the second, fifth and seventh instructions asked for by him, and to certain rulings as to the admission of evidence already referred to.

The case was submitted on briefs.

H. J. Jaquith & C. S. Batt (of New York), for the defendant. I. R. Clark & G. F. Ordway, for the plaintiff.

BRALEY, J. If, as contended by the defendant, the walnuts were to be paid for by furnishing to the plaintiff as it might call for them other goods of equivalent value in which he dealt, there was upon the undisputed evidence a completed sale. Sales act, St. 1908, c. 237, § 9. Commonwealth v. Clark, 14 Gray, 367, 872. Howard v. Harris, 8 Allen, 297. Gallus v. Elmer, 193 Mass. 106. The title having passed, the only question as to liability was, whether on conflicting testimony the price was payable in money, with the burden of proof upon the plaintiff. The seventh request, therefore, was rightly refused, while the substance of the second and fifth requests were fully covered by the instructions.

Nor was there error in the admission or exclusion of evidence. By R. L. c. 175, § 22, "A party who calls the adverse party as a witness shall be allowed to cross-examine him," and the scope of the cross-examination of the defendant, as well as the order of proof, was within the discretion of the trial judge. Jennings v. Rooney, 183 Mass. 577. Sullivan v. Fugazzi, 193 Mass. 518, 521, and cases cited. It also was wholly irrelevant whether the defendant offered to the plaintiff's broker or other persons a price less than that which he ultimately agreed to pay, as there was no dispute about the amount finally agreed upon by the parties. The excluded offer to prove the prices at which the defendant was selling his own goods did not harm the defendant, as the jury were expressly instructed, that if payment was to be made in merchandise, as the defendant testified, the plaintiff could not recover.

If the exception had not been urged, it would seem unnecessary to say, that the evidence of the plaintiff's treasurer that he never accepted the defendant's proposition to take payment "in barter," was admissible in rebuttal. The fact that the evidence to be rebutted had been elicited in the cross-examination of the defendant did not affect its admissibility. *Emerson* v. *Wark*, 185 Mass. 427. *Anderson* v. *Middlebrook*, 202 Mass. 506.

The exceptions accordingly must be overruled, and, it appearing that they are immaterial, the plaintiff's request for double

costs and interest at the rate of twelve per cent on the verdict from the time when the exceptions were allowed to the date of entering judgment should be granted. R. L. c. 156, § 18.

So ordered.

HELEN G. ANJOU vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 11, 1911. — March 8, 1911.

Present: Knowlton, C. J., Lobing, Brally, Sheldon, & Rugg, JJ.

Negligence, Elevated railway: care of station.

At the trial of an action against an elevated railway company to recover for personal injuries received by the plaintiff and due to his slipping upon a banana peel on the upper platform of a station of the defendant as he was following an employee of the defendant who was directing him to another car, there was evidence tending to show that it was the duty of certain employees of the defendant, one of whom was at the station all the time, to observe and to remove whatever was upon the platform to interfere with the safety of travellers. The description of the banana peel by different witnesses was that it "felt dry and gritty as if there were dirt upon it," as if "tramped over a good deal," as "flattened down, and black in color," "every bit of it was black, there wasn't a particle of yellow," that it was "black, flattened out and gritty." Held, that the question of the defendant's liability was for the jury, who might have found that the banana peel had been upon the platform for a considerable period of time and had been left there negligently by employees of the defendant in violation of the defendant's duty to keep its station reasonably safe for its passengers.

RUGG, J. The plaintiff arrived on one of defendant's cars on the upper level of the Dudley Street terminal; other passengers arrived on same car, but it does not appear how many. She waited until the crowd had left the platform, when she inquired of one of defendant's uniformed employees the direction to another car. He walked along a narrow platform, and she, following a few feet behind him toward the stairway he had indicated, was injured by slipping upon a banana peel. It was described by several who examined it in these terms: it "felt dry and gritty as if there were dirt upon it," as if "trampled over a good deal," as "flattened down, and black in color," "every bit of it was black, there wasn't a particle of yellow" and as "black, flattened out and gritty." It was one of the duties of employees of the defendant, of whom there was one at **VOL. 208.** 18

this station all the time, to observe and remove whatever was upon the platform to interfere with the safety of travellers. These might have been found to be the facts.

The inference might have been drawn from the appearance and condition of the banana peel that it had been upon the platform a considerable period of time, in such position that it would have been seen and removed by the employees of the defendant if they had performed their duty. Therefore, there is something on which to base a conclusion that it was not dropped a moment before by a passenger, and Goddard v. Boston & Maine Railroad, 179 Mass. 52, and Lyons v. Boston Elevated Railway, 204 Mass. 227, are plainly distinguishable. The obligation rested upon the defendant to keep its station reasonably safe for its passengers. It might have been found that the platform was suffered to remain in such condition as to be a menace to those rightfully walking upon it. Hence there was evidence of negligence on the part of the defendant, which should have been submitted to the jury. MacLaren v. Boston Elevated Railway, 197 Mass. 490. Foster v. Old Colony Street Railway, 182 Mass. 378. Rosen v. Boston, 187 Mass. 245. Kingston v. Boston Elevated Railway, 207 Mass. 457.

In accordance with the terms of the report,* let the entry be Judgment for the plaintiff for \$1,250 with costs.

- J. J. Cummings, (H. J. Dixon with him,) for the plaintiff.
- J. E. Hannigan, for the defendant, submitted a brief.

^{*} The case was tried before *Brown*, J., who, at the close of the evidence, by agreement of the parties ordered a verdict for the defendant and reported the case to this court for determination, the agreement stating: "If there was any evidence of negligence on the part of the defendant which should have been submitted to the jury, then judgment shall be entered for the plaintiff for \$1,250 with costs of suit. Otherwise, the verdict to stand."

PATRICK J. GALLAGHER vs. JEREMIAH P. O'RIORDEN. SAME vs. SAME.

Suffolk. January 12, 1911. — March 8, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence, Wanton or reckless misconduct.

Evidence that the driver of a caravan drawn by two horses ordered a boy five years of age, who was upon the caravan without his permission, to leave it, that he stopped the caravan for the boy to do so and that, with the reins in his hands, he stood looking at the boy, and not at the horses, as the boy was getting over one of the rear wheels, when the horses started and the boy was run over, has no tendency to show that the injury to the boy was caused by reckless or wanton misconduct on the part of the driver, and therefore will not support an action by the boy against the driver's employer to recover for the injuries thus received.

Braley, J. The first action is to recover for personal injuries suffered by the plaintiff, an infant five years of age, who while alighting was thrown from a "caravan team" in charge of the defendant's servant, and the second action is brought by the father to recover for loss of his son's services. In each case the amended declaration alleged wanton, reckless and gross negligence on the part of the driver, and, a verdict having been ordered for the defendants at the close of the plaintiffs' evidence, the cases are before us on a report, with a stipulation, that if the ruling was right judgment for the defendants is to be entered on the verdicts, but if wrong, each plaintiff is to have judgment for a stipulated amount. No question of the weight of the evidence is presented, and if there was any testimony to sustain the allegations, the plaintiffs must prevail.

To begin with, it is conceded that the boy was a trespasser, and the driver, having discovered his presence, stopped the team and ordered him with other boys who were "standing on the team" to get off. The jury could have found that, having given this order, he could not act so recklessly or wantonly as to endanger the plaintiff's safety while it was being obeyed. But

^{*} By Dana, J., before whom the cases were tried.

under the most liberal interpretation, the evidence * wholly fails to show that while the plaintiff was alighting the sudden starting of the team which caused his fall and injury was attributable to any intentional purpose of the driver to proceed regardless of the plaintiff's position or of the likelihood that he might be shaken off and fall under the wheel. If the plaintiff had been on the caravan at the driver's express invitation or was riding with his consent, a different question would be presented. Knowledge however that the plaintiff was there, that he had been ordered to depart, while the team which had been stopped again went on without the driver having first ascertained if the plaintiff had alighted, are as matter of law under our decisions insufficient to show such wilful misconduct as to support the action. Bjornquist v. Boston & Albany Railroad, 185 Mass. 180. Anternoitz v. New York, New Haven, & Hartford Railroad, 193 Mass. 542. West v. Poor, 196 Mass. 183. Barry v. Stevens, 206 Mass. 78. Black v. Boston Elevated Railway, 206 Mass. 80. Menut v. Boston of Maine Railroad, 207 Mass. 12, 19.

The entry in each case therefore must be judgment for the defendant.

So ordered.

D. H. Coakley, R. H. Sherman & W. Flaherty, for the plaintiffs, submitted a brief.

W. H. Hitchcock, (C. M. Pratt with him,) for the defendant.

^{*} There was evidence tending to show that the minor plaintiff was on one of the rear wheels of the caravan in the act of alighting and that the driver, holding the reins in his hands, was looking at the boy and not at the horses, when the caravan started and ran over the boy.

Andrew Keaveny vs. Michael Moran & others.

Suffolk. January 12, 1911. — March 8, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence, In use of highway.

At the trial of an action for injuries received from being run over by the defendant's horse and wagon, it appeared that the place of the accident was at the intersection of two streets which ran respectively east and west and north and south, and there was evidence tending to show that the plaintiff, having looked in each direction, had started upon the crosswalk across the street running east and west and had reached a point half way across, when, seeing an automobile approaching, he had stopped to let it pass, and then, "before he knew it," he was struck by the defendant's team, which had come from the other street from the direction in which the plaintiff was facing and which, according to various witnesses, was going "quite" or "pretty" fast; and one witness testified that after the plaintiff was run over the defendant's horse "went" for some distance, "was caught, turned around, came back, and then went . . . in the direction in which it was coming prior to turning the corner and striking" the plaintiff. Held, that the questions, whether the plaintiff was in the exercise of due care and whether the defendant's horse was being managed with proper care, were for the jury.

Tort for personal injuries received by the plaintiff from being run over by a horse and wagon of the defendants, as he was crossing North Beacon Street in that part of Boston called Brighton at its intersection with Market Street. Writ dated June 21, 1907.

At the trial in the Superior Court before White, J., it appeared that Market Street runs easterly and westerly and North Beacon Street northerly and southerly, the two crossing at right angles.

The plaintiff testified in substance that at noon on May 11, 1907, he walked northerly along the westerly side of North Beacon Street, crossed Market Street almost to the northwesterly corner, turned and started to cross North Beacon Street on the crosswalk toward the northeasterly corner, saw an automobile coming toward him from the north and stopped, just before he got to a car track which was on North Beacon Street, to let it pass, and that, after the automobile passed "before he knew it" he was struck by the defendant's team; that he did not see the

team before it struck him. In cross-examination he testified that he looked both ways before crossing the street.

Other witnesses for the plaintiff testified that the defendant's team came westerly down Market Street "quite fast," and "pretty fast," and turned into Market Street, that after the plaintiff was run over the team "went down North Beacon Street,... was caught, turned around, came back, and then went down Market Street in the direction in which it was coming prior to turning the corner and striking" the plaintiff.

At the close of the plaintiff's evidence the presiding judge ordered a verdict for the defendants and by agreement of the parties reported the case to this court for determination, judgment to be entered for the defendants if his ruling was right; otherwise, judgment to be entered for the plaintiff for \$400.

- J. M. Graham, for the plaintiff.
- C. M. Pratt, (W. H. Hitchcock with him,) for the defendants. Sheldon, J. 1. The jury could have found that the plaintiff was in the exercise of due care. He was crossing North Beacon Street upon the proper crosswalk, walking in the usual way, after having looked in each direction. He observed an automobile coming, and stopped to keep out of its way. He was not bound to anticipate that a horse and wagon would come rapidly down Market Street, turn suddenly into the cross street and run against him.
- 2. There was evidence of the defendant's negligence. It was for the jury to say whether the horse was beyond the control of the driver, when it turned suddenly into North Beacon Street and ran into the plaintiff. The circumstances were such that the jury could find that the accident would not have happened if the defendant's horse had been managed with proper care.

See as to both these points Donovan v. Bernhard, ante, 181, and cases there cited.

According to the terms of the report, judgment must be entered for the plaintiff for the sum of \$400.

So ordered.

CHARLES WHITE vs. JOHN C. NEWBORG.

Suffolk. January 12, 1911. - March 3, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Agency, Existence of relation. Negligence, Employer's liability.

- At the trial of an action where a material issue is, whether the plaintiff was employed by the defendant, if there is evidence tending to show that the plaintiff, before going to work, asked the defendant, who "was engaged in building three houses on a parcel of land, the title to which stood in his wife's name," "Are you the boss?" and that, receiving an affirmative reply, he asked further "Is it all right to go to work?" to which the defendant replied, "Sure, I want three or four men. This is a hurry job"; that the defendant furnished to the foreman of the job pay envelopes which the foreman handed to the men and that the defendant gave some directions as to the way in which the work should be done, the jury is warranted in finding that the plaintiff was in the employ of the defendant.
- A carpenter who is injured by the fall of a staging upon which he is at work, due to a decayed condition of a bracket, may be found to have been in the exercise of due care if he had nothing to do with the putting up of the staging and if the defect which caused it to fall was not one which a reasonable external examination by him would have revealed.
- At the trial of an action at common law by a carpenter against his employer to recover for personal injuries caused by the falling of a staging upon which the plaintiff was working, there was evidence tending to show that the staging fell because of a decayed condition of one of the brackets of which it was built, that the defendant had owned a number of brackets, among which was the decayed one, for several years, and that his foreman had told him, before the staging was built, that they were "very bad brackets," to which the defendant had replied "You will have to patch them up the best way you can"; that the brackets then were tested, several were rejected, others were repaired and all of those not rejected necessarily were used; that fellow employees of the defendant subjected the brackets used to a test, which might have been found to have been inadequate to discover the defect which existed or to have been applied negligently. Held, that the duty to provide the plaintiff with a reasonably safe place to work was one personal to the defendant, which he could not delegate to another, and therefore that it was no defense that the accident was caused by the negligence of a fellow servant of the plaintiff and the question of the defendant's liability was for the jury.

TORT for personal injuries alleged to have been received by the plaintiff while in the defendant's employ as a carpenter and due to the falling of a staging upon which he was working. Writ dated July 27, 1907.

In the Superior Court the case was tried before Harris, J.

It appeared that "the defendant was engaged at the time of the accident in building three houses on a parcel of land, the title to which stood in his wife's name." Other material facts are stated in the opinion. There was a verdict for the plaintiff upon a count in the declaration alleging negligence of the defendant at common law; and the defendant alleged exceptions.

- J. F. Cronin, for the defendant.
- S. C. Brackett, for the plaintiff.
- Rugg, J. 1. There was evidence sufficient to support a finding that the plaintiff was in the employ of the defendant. The plaintiff testified that before he went to work he asked the defendant, "Are you the boss?" On receiving an affirmative reply, the plaintiff asked, "Is it all right to go to work?", to which the defendant answered, "Sure, I want three or four men. This is a hurry job." There was also evidence that the defendant furnished to the foreman pay envelopes which the latter handed to the men, and that the defendant gave some directions about the way in which the work should be done. There was also ample evidence from which it might have been found that the defendant made a contract with one Hopey to furnish all the labor for the building. But in the light of all the testimony, it could not have been ruled as matter of law that the plaintiff was not in the employ of the defendant. It was a fact to be settled by the jury. Lewis v. Coupe, 200 Mass. 182. Trepannier v. Cote, 207 Mass. 484.
- 2. The plaintiff may have been found to have been in the exercise of due care. He had nothing to do with putting up the staging which fell, and there was nothing about its external appearance which a reasonable examination by him would have revealed.
- 3. The only remaining question now material is whether there was any evidence to support a finding that negligence, for which the defendant was responsible, caused the injury to the plaintiff. He was hurt by the breaking of a bracket used to support a staging. There was testimony to the effect that the bracket, which was made of two pieces of wood fastened together so as to make a right angle, with a brace between the two near their outer ends, was broken, at the joining of the brace with the horizontal piece of the bracket as it was put on the build-

ing, and appeared to be decayed, and that this, with other brackets, had belonged to the defendant for several years, and when he brought them to the house, he was told by the foreman that they were "very bad brackets." He replied, "You will have to patch them up the best way you can." The brackets were then tested, several rejected, others repaired, and when the plaintiff was injured all were necessarily in use. Hence, this is not a case of a sufficient stock of implements furnished from which employees were to make selection.

It might have been found to be a failure of duty not to discover a decayed condition of wood which is to support a staging. The testing which was described may have been found to have been not directed to this end, nor adapted to discover such a defect.* It was an obligation personal to the defendant as employer to provide a reasonably safe place for the plaintiff to work, the performance of which under the circumstances of the present case he could not delegate to a servant in such a way as to wholly exonerate himself. If furnishing a place of safety depends upon inspection and tests, these must be done with such intelligence and skill as the nature of the work and the consequence of dereliction in way of injury to others may reasonably demand. So far as this is done through servants, they act as to other employees not under the fellow servant rule, but as the representative of the master, for whose care he is responsible. If the foreman of the defendant or the others to whom he entrusted the duty of inspecting, testing and repairing the brackets failed to exercise reasonable diligence, he is responsible even though he gave sufficient directions and employed competent servants. Mounihan v. Hills Co. 146 Mass. 586. Erickson v. American Steel & Wire Co. 198 Mass. 119, 125. Lundergan v. Graustein, 203 Mass. 532. Rosseau v. Deschenes, 203 Mass. 261. Exceptions overruled.

^{*} The test was described as follows: "The test is made by placing the lower end of the upright on the ground, then by taking hold of the outer end of the horizontal and putting all your weight on that end. If the bracket is loose at the joint where the brace joins the horizontal or the upright when put to this test will sometimes crush out entirely and when it is loose there and does not crush out entirely it will work over on the joint and give and they consider it unfit for use and throw it away."

WILLIAM J. HINES vs. WALTHAM MANUFACTURING COMPANY.

Middlesex. January 13, 1911. - March 8, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Negligence, Employer's liability, In machine shop.

At the trial of an action at common law against the proprietor of a machine shop by one who, while employed therein, lost the sight of an eye because of the flying off of a chip from the edge of a boring tool or reamer of a lathe upon which he had been set at work, there was evidence that the chip flew off because the tool, having been adjusted for the work that was being done by it on a cylinder, suddenly "dug in" to the cylinder owing to an irregular motion of the tool which was due to the worn condition of a nut on an automatic cross feed screw which controlled the movements of the tool, and that the condition of the tool was known to the foreman of the room where the plaintiff was working, who was the defendant's representative. Held, that there was evidence of negligence of the defendant in furnishing a defective lathe for the plaintiff's use.

If one, who is employed in a machine shop, having noticed a defective condition of a lathe at which he is set at work, calls it to the attention of the foreman of the shop, who directs him to perform other work, saying to him in response to his offer to make the necessary repairs, "I will have another man fix this immediately for you"; and if, a week later, the foreman directs the employee to resume his work upon the lathe, and the employee is injured because of a defect in the lathe which he easily could have discovered although it was not visually apparent, the employee cannot, be said as a matter of law to have assumed the risk of such an injury, and, in an action against his employer for injuries so received, the questions, whether he assumed the risk of the injury, or failed to exercise due care, are for the jury.

TORT for personal injuries received as stated in the opinion while the plaintiff was in the employ of the defendant at its machine works. Writ dated January 16, 1908.

The declaration contained three counts, the first count alleging negligence of a superintendent of the defendant under R. L. c. 106, § 71, cl. 2, the second alleging a defect in the ways, works or machinery of the defendant under cl. 1, and the third alleging a cause of action at common law in that, among other things, the defendant furnished the plaintiff with unsafe and unsuitable tools, appliances and apparatus to work with.

The case was tried before *Hitchcock*, J. The facts are stated in the opinion. At the close of the evidence, the defendant made four requests for rulings, the first being a request for a

ruling that upon all the evidence the plaintiff could not recover, and the second, third and fourth being a like request as to each count in the declaration.

The judge refused to make any of the rulings asked for. The jury found for the plaintiff in the sum of \$7,500 on the third count of the declaration; and the defendant alleged exceptions.

J. Lowell & J. A. Lowell, for the defendant.

R. H. Sherman, for the plaintiff.

BRALEY, J. The plaintiff while at work on an ordinary engine lathe reaming the inside of a casting which was to be made into an automobile cylinder, lost the sight of an eye by a flying chip from the edge of the boring tool or reamer. If not conceded by the defendant, there was abundant evidence that the edge splintered, because the tool, having been adjusted for the thickness of the scarf to be planed off, suddenly "dug in" to the cylinder owing to the nut on the automatic cross feed screw, which controlled the movements of the tool, having become so worn as to produce an irregular instead of a uniform action. It also appeared that this condition, described by the witnesses as "lost motion," was known to the defendant's foreman of the "lathe room," who must be considered as the defendant's representative. Ruddy v. George F. Blake Manuf. Co. 205 Mass. 172, 181.

But if there was proof of its negligence in furnishing a defective lathe, the defendant contends that the plaintiff, who knew that the machine had not been running properly, assumed the risk, or did not use ordinary prudence to ascertain if there was any lost motion before going on with the work. No doubt, as the mechanical experts all agreed, if the plaintiff, who was a skilful machinist and knew of the method, had shaken the cross feed apparatus, the defect although not visually apparent would have been discovered. Yet it is obvious from his evidence that this was not the situation in which he was placed at the time of the accident. Having noticed the irregularity a week before, he then called the attention of the foreman to the lathe, who directed him to perform other work, and in response to the plaintiff's offer to make the necessary repairs replied, "I will have another man fix this immediately for you." If the jury believed the plaintiff, there was not only a promise to repair, but a change in the plaintiff's employment while the repairs were being made. But the evidence does not end here. The superintendent on the day of the accident ordered him to resume his former work, and to use the lathe. It is settled by our decisions, that under such circumstances the plaintiff was warranted in assuming that the defect had been remedied, and the question whether by his conduct he assumed the risk, or failed to exercise ordinary care, was for the jury. Jellow v. Fore River Ship Building Co. 201 Mass. 464, 467, 468. Griffin v. Joseph Ross Corp. 204 Mass. 477, 481.

A verdict having been returned only on the count at common law, the first and second requests therefore were rightly refused. Nor can the remaining exception be sustained. If we assume that the answer of the defendant's witness who was called as a mechanical expert would have supported its contention, that the breaking of the boring tool was not attributable to the lost motion, it was for the presiding judge to decide as to his qualifications, and no abuse of this discretionary power having been shown, his adverse decision is not a ground of exception. Carroll v. Boston Elevated Railway, 200 Mass. 527, 583.

Exceptions overruled.

HENRY N. CLARK COMPANY vs. SAMUEL F. SKELTON & another.

SAME vs. CHARLES H. GREENWOOD.

Suffolk. January 18, 1911. - March 8, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Fixtures.

Portable furnaces, which are removable from place to place by disconnecting the smoke pipes and the heat pipes as those of a stove or range are disconnected, do not necessarily become a part of the real estate to which they are affixed, and whether they have become so is a question of fact. Following Towns v. Fishs, 127 Mass. 125.

Two actions of replevin by the same plaintiff against different defendants, each to recover possession of two furnaces with their accompanying pipes and registers, which were in the possession of the respective defendants at the time of the service of the plaintiff's writs. Writs in the Municipal Court of the City of Boston dated March 28, 1909.

On appeal to the Superior Court the cases were tried together before Sanderson, J. It appeared that the defendant Greenwood sold two parcels of land in Dorchester to one Cossett, who was a builder and bought the land for the purpose of constructing upon each of the lots a two family apartment house in conformity with the general character of houses in that locality. Cossett gave to one Babcock a first mortgage upon each parcel for \$5,000 advanced to him as a construction loan, and gave a second mortgage to the defendant Greenwood upon each parcel for \$1,000 as security for the payment of the purchase price.

The deed of the two lots to Cossett and these four mortgages by Cossett were given and recorded simultaneously on June 16, 1908. Cossett started to build the houses immediately and constructed them with the intention of putting in portable hot air furnaces as a heating plant, building into the walls, before they were lathed or plastered, pipes for conducting heat to the various rooms.

On October 17, 1908, Cossett purchased from the plaintiff, under a contract of conditional sale called a lease, the four portable hot air furnaces in question and they were delivered and set up by the plaintiff, two in each house. They were portable furnaces, removable from place to place, and all that was necessary to do to remove them was to disconnect the smoke pipes and the heat pipes as one would the pipes of a stove or range. All that the plaintiff did in installing these furnaces was to slip the smoke pipes running from the furnaces into the chimney and the heat pipes running therefrom into the joints of the pipes which already had been installed in the walls of the houses. The plaintiff had nothing whatever to do with placing these pipes in the walls of the houses, which carried the heat through the house, or with building the cold air boxes.

Greenwood foreclosed both of his second mortgages by entry on December 10, 1908, and by an auction sale on January 4, 1909, at which he himself became the purchaser of both parcels with the two houses which had been constructed and completed by Cossett. The defendants Skelton probably held under Greenwood, although this does not appear from the report.

By the terms of the contract of conditional sale the furnaces were to remain the property of the plaintiff until they were paid for in full, with the right to take and remove them upon a failure by the purchaser, Cossett, to make the payments required by the contract. It seems to have been assumed that the plaintiff brought the two actions of replevin to take possession of the furnaces on account of a breach of condition in the contract of sale but this is not stated in the report.

At the close of the evidence the judge with appropriate instructions submitted the cases to the jury, who in each case returned a verdict for the plaintiff. Thereupon the judge, by agreement of the parties, reported the cases for determination by this court of the question whether or not upon all the evidence the cases should have been submitted to the jury. If the action of the judge in submitting the cases to the jury was right, the verdicts were to stand; if it was wrong, judgment was to be entered for the defendants in both cases.

- J. J. Feely, for the plaintiff.
- T. C. Batchelder, for the defendants.

RUGG, J. These are actions of replevin to recover certain portable furnaces. The only question raised is whether as matter of law they had become a part of the real estate. These furnaces appear to have been of the same kind as to size, method of attachment and use as those under discussion in Towne v. Fiske, 127 Mass. 125, where it was held that the issue was for the jury. Generally it is a mixed question of law and fact whether articles of personal property which can be moved and used in another place have become a part of the real estate. This principle has been applied in several cases where the issue has arisen whether movable furnaces and ranges were fixtures. Turner v. Wentworth, 119 Mass. 459. Ridgeway Stove Co. v. Way, 141 Mass. 557. Jennings v. Vahey, 183 Mass. 47. Hook v. Bolton, 199 Mass. 244. Smith v. Bay State Savings Bank, 202 Mass. 482. There is nothing in the present case not fully covered by these decisions.

Verdicts to stand.

WILLIAM J. HORGAN vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 13, 1911. - March 8, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

False Imprisonment. Estoppel. Waiver. Joint Tortfeasors. Carrier, Of passengers.

A person, who has been arrested without a warrant for drunkenness and after he has recovered from his intoxication has made a statement in writing and a request for release under the provisions of St. 1905, c. 384, and who upon such request has been released, cannot sue the officer who arrested him for illegal arrest or imprisonment, this being expressly provided by § 2 of the statute, which in this provision is merely declaratory of the common law.

If a person arrested is discharged upon his voluntary request to be freed from arrest without arraignment, he waives any claim for damages which he otherwise might have had against the officer who arrested him.

If an arrest for drunkenness is made without a warrant by two persons jointly, one of whom is a police officer and the other of whom is not, and the person arrested after he has recovered from his intoxication makes a statement in writing and a request for release under the provisions of St. 1905, c. 384, and is released upon such request, this not only discharges the police officer from liability for illegal arrest or imprisonment, but also discharges from such liability the person not an officer who joined in making the arrest, because the discharge of one of two joint tortfeasors discharges both.

In an action against a carrier of passengers for an illegal arrest and false imprisonment alleged to have been committed by its servants, if it appears that the servants alleged to have committed the illegal acts are not liable for them or have been released from such liability, this exonerates the carrier and is a defense to the action.

TORT for an alleged illegal arrest and false imprisonment of the plaintiff alleged to have been committed by the servants of the defendant after the plaintiff had entered the subway station of the defendant at Scollay Square in Boston on October 29, 1907. Writ dated December 7, 1907.

The answer contained a general denial and a plea of justification. In the Superior Court the case was tried before *Brown*, J. The evidence is described in the opinion. At the close of the evidence the judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

- D. H. Coakley, R. H. Sherman & W. Flaherty, for the plaintiff, submitted a brief.
- E. P. Saltonstall, (A. M. Beale with him,) for the defendant. BRALEY, J. The verdict for the defendant was ordered at the close of all the evidence, but as the jury could have disbelieved the defendant's witnesses so far as their testimony was material, the question is, whether upon the plaintiff's own narrative he could prevail.

Having entered the subway station of the defendant and paid his fare with the intention of becoming a passenger, the plaintiff was lawfully on the premises, and, if while passing through the turnstile to take a car its servants unlawfully molested him by physical restraint, the defendant is responsible for the injury. Lockwood v. Boston Elevated Railway, 200 Mass. 537, 544; Jackson v. Old Colony Street Railway, 206 Mass. 477. Nor can the corporation escape liability even if its servants acted as special police officers appointed under the provisions of the St. of 1898, c. 282. By § 2 the defendant is made liable for their official misconduct, to the same extent as for their torts when acting as its employees.

The plaintiff testified, that two of the defendant's servants, one of whom was a special police officer, took him into custody, and brought him to the police station where he was charged by the officer with the offense of drunkenness. If the plaintiff was found intoxicated in a public place, "or . . . any place . . . disturbing others by noise," he could be arrested by a police officer without a warrant, and no question seems to have been made by the plaintiff at the trial, nor does he now contend, that the arresting officer was not qualified to act, or that the railway station was not a public place. R. L. c. 212, § 36. Short v. Symmes, 150 Mass. 298.

The St. of 1905, c. 384, § 1, which was inserted by the Legislature in place of R. L. c. 212, § 37, governing proceedings after arrest for drunkenness without a warrant, required the officer to make complaint to the court having jurisdiction of the offense. The arrest is only preliminary, and although "complaint" means the oral allegations by the officer which are to be reduced to writing in proper form by the magistrate or court, the officer is liable to an action for assault and false imprisonment unless he

complies with the requirement. Hobbs v. Hill, 157 Mass. 556. Martin v. Golden, 180 Mass. 549. Brock v. Stimson, 108 Mass. 520. But, the plaintiff having admitted that when he arrived at the police station he was charged by the officer with "the crime of drunkenness," it is to be presumed in the absence of any qualifying statement, that the statute was followed.

No further steps were taken to bring him before the court, and, having been discharged without arraignment or trial, the plaintiff ordinarily would have the right to go to the jury on the question, whether when arrested he was intoxicated, with the burden of proof on the defendant to justify the arrest. Phillips v. Fadden, 125 Mass. 198. Hathaway v. Hatchard, 160 Mass. 296. The statute, however, while guarding against the abuse of criminal process, also confers the privilege on the party arrested after recovering from his intoxication to procure his discharge without the publicity of a trial. He may ask in writing for his release, and after certain preliminaries are complied with, the officer for the time being in charge of the place of detention may forthwith discharge him. St. 1905, c. 384, § 1. The paper put in evidence during the cross-examination of the plaintiff, and signed by him, was in terms such a request. It is not contended by the plaintiff that his signature was procured by fraud or coercion, or that any attempt was made to conceal any material portion of the paper, or that he was illiterate and did not have full opportunity to acquaint himself with its contents. The instrument having been voluntarily and intelligently presented by him as his own act, and his discharge thereby obtained, the plaintiff ought not to be permitted to set it aside after the releasing officer acted in reliance upon the statute. Trambly v. Ricard, 180 Mass. 259, 260, 261. McNamara v. Boston Elevated Railway, 197 Mass. 383. It is not only expressly provided by St. of 1905, c. 384, § 2, that if the person arrested is released at his request the officer who took him into custody shall not be liable for an illegal arrest or imprisonment, but settled law, that if a party voluntarily asks to be freed from an arrest without arraignment, and his discharge follows, he impliedly waives any claim for damages which otherwise he might have had against the officer. Caffrey v. Drugan, 144 Mass. 294. Joyce v. Parkhurst, 150 Mass, 248, 247. Bates v. Reynolds, 195 Mass, 549. **VOL. 208.** 19

The wrong also was participated in by another employee of the defendant who was not a police officer. But the tort being joint, the plaintiff at common law, having discharged one of the wrongdoers, could not hold the other. *Brewer* v. *Casey*, 196 Mass. 384, 388, 389.

If for the reasons stated the plaintiff could not prevail in a suit against the officer or the officer's fellow servant, he cannot recover against the defendant. The carrier when sued for an assault by the carrier's servant upon a passenger may prove in justification that the servant could not have been held liable, or has been released, and, if the servant was not responsible in damages, the carrier also is exonerated. Jackson v. Old Colony Street Railway, 206 Mass. 477. New Orleans & Northeastern Railroad v. Jopes, 142 U. S. 18.

Exceptions overruled.

GILMAN W. BROWN vs. ANNA W. BROWN. SAME vs. SAME. SAME vs. SAME.

Essex. January 16, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Practice, Civil, Conduct of trial, Exceptions. Witness, Re-direct examination. Marriage and Divorce.

It is wholly within the discretion of a presiding judge to determine whether cumulative evidence shall be received upon a point which has been admitted by the adverse party.

Although a witness upon his re-direct examination may be allowed to correct or modify testimony given on his cross-examination, yet the libellant in a divorce trial, where there is an issue as to condonation, properly may be refused permission to explain on his re-direct examination what he meant by the words "contemplated reconciliation" as used in his cross-examination to describe his state of mind and purpose in several meetings between him and the libellee, after a separation growing out of her misconduct and after repeated expressions of penitence and appeals for forgiveness from her, the words as used in this connection being so plain that there can be no ambiguity or uncertainty as to their significance.

Where the presiding judge at a trial excludes certain evidence, stating that it is excluded as being cumulative evidence in regard to a matter admitted by the adverse party and on which the judge has found in favor of the party offering the evidence, if the party offering the evidence excepts to the exclusion generally, without suggesting any other ground on which the evidence should be admitted, his exception will be taken to be to the exclusion of the evidence upon the ground stated by the judge, and he will not be allowed to argue that the exclusion was wrong because the testimony offered was admissible for a different purpose. In the present case it appeared that the different ground on which the evidence was said to be admissible was not applicable.

THREE LIBELS FOR DIVORCE, between the same parties, the first filed on July 26, 1904, and the third on June 1, 1908, the papers in the second case having been lost.

In the Superior Court *Lawton*, J., in each of the three cases found for the libellee and ordered a decree dismissing the libel. The libellant alleged exceptions, raising the questions described in the opinion.

The cases were submitted on briefs.

- V. C. Lawrence & R. L. Mitchell, for the libellant.
- H. Parker & R. Walcott, for the libellee.
- RUGG, J. These are three libels for divorce before us upon the libellant's exceptions to evidence.
- 1. One of the grounds alleged for divorce was adultery with one Whipple. The libellee admitted this, but alleged condonation by the libellant. In this state of the case, the libellant offered two letters written by the libellee at about the time of this admitted misconduct, tending to show an adulterous disposition on her part toward the co-respondent, which were excluded. The libellant's exception to this ruling must be overruled. It was said by Chief Justice Gray in *Dorr* v. *Tremont National Bank*, 128 Mass. 849, at 360, "Whether further evidence shall be received upon a point expressly admitted by the adverse party is wholly within the discretion of the judge presiding at the trial."
- 2. The libellant sought to explain in re-direct examination what he meant by the words "contemplated reconciliation" used in cross-examination as describing his state of mind and purpose in several meetings between him and the libellee, after a separation growing out of her misconduct, and her repeated expressions of penitence and appeals for forgiveness. These words were so plain in this connection that there could be no ambiguity or uncertainty in their significance. The witness did not express a desire to correct, withdraw or modify testimony

given, nor to complete a thought or conversation only partially stated in his evidence. Synonyms or paraphrases for perfectly comprehensible words in common use were properly excluded.

3. One of the grounds alleged for divorce was cruel and abusive treatment, which, it was contended, consisted in an attempt by the libellee to poison the libellant. The libellant testified fully as to his feelings and symptoms tending to show a poisoning, which came during a severely painful illness occurring soon after some attention from the libellee while he was recovering from a surgical operation. His attending physicians testified to their opinion of its cause. Thereafter the libellant called a nurse, a part of whose testimony was: Q. "You did not attend Mr. Brown in his illness? A. I didn't attend him. - Q. Miss Brown was the nurse who was attending him at that time? A. Yes." She was then asked, "Did he describe to you at that time the symptoms which he felt?" and "What evidence of pain or otherwise did you detect in him at that time?" questions were excluded on objection, the presiding judge saying, "There is no question made by the other side but that he had some sort of an upset after eating the orange, and that it injured the wound, and was a very serious thing, no question about that." It is not clear whether the witness was not asked to repeat a narration made to her by the libellant of sensations after they had passed from him. If so they were incompetent. But passing this point, the language of the judge was a plain ruling that the evidence was rejected as being cumulative touching a fact which the opposing side admitted; and the judge had found in favor of the party proffering the evidence. This was proper practice and not open to exception. If the party offering the evidence had in mind any other ground upon which it was competent than that given by the judge, it became his duty then to offer to state it. He cannot now press its admission on a ground not suggested at that time. The fair implication from these circumstances is that the exception was taken to the ground of exclusion stated in the ruling. It is urged that the testimony was competent for the reason that the libellee had endeavored to show that the symptoms were a recent fabrication, and that therefore declarations similar to his testimony made at about the time the event occurred were admissible to support his credit as

a witness within the exception laid down in Commonwealth v. Jenkins, 10 Gray, 485, 489, and Griffin v. Boston, 188 Mass. 475, to the general rule excluding statements made by a witness at other times corroborative of his testimony. This is an extremely narrow rule, as is shown also in Commonwealth v. Tucker, 189 Mass. 457, 479-485. The present record shows no foundation for its application, because the assertion of the judge of the Superior Court, which was unchallenged, was that the other side did not dispute these facts. The only circumstance, which appears to have been asserted to have been a subsequent invention, was that the libellee was responsible for them, and this according to the record was uncontroverted by the libellant.

The other exceptions have not been argued and are treated as waived.

Exceptions overruled.

SAMUEL J. McNeilly vs. Cornelius F. Driscoll & others.

Norfolk. January 16, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Evidence, Presumptions and burden of proof. Surety. Bond, To dissolve attachment. Practice, Civil, Amendment of writ, Ad damnum.

Where in a bill of exceptions it is stated that on the day a writ was entered in a municipal court the ad damnum of the writ was increased to an amount named "by agreement of counsel," yet, if a statement of the increase of the ad damnum appears as one of the docket entries in a certified copy of the record of the court in which the case was pending, it will be assumed that the amendment by agreement of counsel received the approval of the court.

Where a bond to dissolve an attachment has been given for the penal sum of \$500, and the ad damnum of the writ in the action in which the attachment was made is only \$800, a surety on the bond is not released from liability by an amendment of the writ after the execution of the bond increasing the ad damnum to \$500, the penal sum of the bond.

CONTRACT against the principal and two sureties upon a bond to dissolve an attachment made by trustee process in an action brought in the Municipal Court of the City of Boston. Writ in the Municipal Court of Brookline dated January 15, 1909.

The action was defended only by Annie McGuire, one of the sureties on the bond. In her answer, after a general denial, she

alleged that after she had signed the bond as surety the addamnum of the writ in the action in which the attachment was made was raised from \$300 to \$500 without her consent and without any notice to her, whereby she alleged that she was released and discharged from all liability on the bond.

On appeal to the Superior Court the case was tried before Stevens, J., without a jury. The facts appeared in evidence which are stated in the opinion. The defendant Annie McGuire asked the judge to rule that the plaintiff was not entitled to recover against her and also asked for other rulings. The judge made the seventh ruling requested by that defendant, which was as follows: "Where an amendment of the ad damnum of the writ has the effect of increasing the liability of the surety, the surety is released." The judge refused to make any of the other rulings requested by the defendant Annie McGuire, and found for the plaintiff against that defendant in the sum of \$532. That defendant alleged exceptions.

- W. Motley, for the defendant Annie McGuire.
- E. J. Welsh, for the plaintiff, submitted a brief.

RUGG, J. This is an action of contract upon a bond given to dissolve an attachment. The action was commenced by trustee process by the present plaintiff against the principal defendant. The ad damnum in the writ was \$300, but in the recital of that clause, which authorized the attachment of goods and estate in the hands of trustees, it was stated that the defendant had not in his possession property to the value of \$500. Before the return day of the writ the bond, upon which the present action is brought, was executed in the penal sum of \$500. The description of the writ given in the bond recited the attachment to have been made for \$500. On the day when the writ was entered in court, which was three days after the date of the bond, the ad damnum was increased to \$500. Although this was by agreement of counsel, it is certified as a part of the docket entries in the case, and hence must be assumed to have received the approval of the court. The question is whether the surety is discharged by reason of this increase in the ad damnum of the writ.

It is perhaps to be inferred that the \$300 which first appeared in the writ as the ad damnum was a clerical error, inasmuch as



the recital of it in the trustee clause and in the bond was \$500. However that may be, the surety must be held. The defendants gave a bond in a fixed sum. It was within the power of the court, under R. L. c. 173, § 48, to increase the ad damnum of the writ. It must be assumed that the bond was given, subject to this, as well as all other, existing laws affecting the sureties' liability and in contemplation of the possibility of such action by the court. It is not claimed that any new cause of action was introduced.

The point now raised seems to be concluded in favor of the plaintiff by what was said by Devens, J., in Townsend National Bank v. Jones, 151 Mass. 454, at 459: "The liability of the surety is for the penal sum in the bond, with interest. In fixing a penal sum in the bond to dissolve an attachment, he has limited his liability to that amount. . . . He has consented to become responsible, to the amount of the penal sum in his bond, for that which the plaintiff might recover upon the cause of action on which his writ was brought. . . . The liability of the surety is similar to the liability of bail, and where this liability is not increased, the increase of the ad damnum does not discharge the bail. Martin v. Moor, 2 Strange, 922. Brown, 14 Pick. 177, 180. Knight v. Dorr, 19 Pick. 48." The present case in its facts goes slightly farther than those then before the court. The bond there was for the same sum as the ad damnum of the writ, but the latter was subsequently raised. The controlling principle is the same. The penal sum of the bond marks the limit of the sureties' liability, but within that limit any step in the procedure, authorized by law, as to the cause of action incorporated into the bond by reference to the writ, may be taken without discharging the surety. All such action is within the scope of the obligation of the bond. So long as the surety is not required to pay a larger sum than is named in the penal sum of the bond, he has no right to complain of any change in the ad damnum of the writ. If it was his intention to limit his liability to the ad damnum stated in the writ, the penal sum of the bond should have been likewise limited. There are contrary authorities and there is a sentence by way of dictum in Knight v. Dorr, 19 Pick. 48, at page 49, which taken literally supports an opposite result. But in reason there is no sound

ground for holding that one, who has bound himself by formal bond of suretyship to be responsible for any judgment obtained in a named cause of action up to a definite sum, is discharged merely because, according to due process in the courts, a larger judgment is recovered than would have been possible when the bond was executed, provided it is within the amount fixed by the bond. See William W. Bierce, Limited, v. Waterhouse, 219 U. S. 320, 334; Commonwealth v. Teevens, 143 Mass. 210; Driscoll v. Holt, 170 Mass. 262; Doran v. Cohen, 147 Mass. 342; Kellogg v. Kimball, 142 Mass. 124; Morton v. Shaw, 190 Mass. 554; Rogers v. Abbot, 206 Mass. 270; Dunsmoor v. Bankers Surety Co. 206 Mass. 23; Hare v. Marsh, 61 Wis. 435; New Haven Bank v. Miles, 5 Conn. 587.

Exceptions overruled.

HANNAH CARBOLL, administratrix, vs. Fore RIVER SHIP BUILDING COMPANY.

Norfolk. January 17, 1911. — March 3, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, Employer's liability.

In an action by an administrator against the employer of the plaintiff's intestate, for causing his conscious suffering and death by reason of a heavy iron porter bar striking him or falling upon him when a steam hammer crushed a brass casting, in one of the holes of which the bar had been left protruding, it was conceded that there was evidence of due care on the part of the intestate, and there was evidence that an acting superintendent of the defendant in charge of the work gave an order which caused the hammer to descend before the bar had been removed from the casting, knowing that there was danger to the workmen in crushing the casting before the bar was removed. The foreman testified that he intended to follow the usual and safer way and to have the hammer come down only far enough to hold the casting in place without resting the weight of the hammer upon it. It appeared that the order he gave was "Hold it, Billy," Billy being the operator of the hammer, and there was evidence that the words "hold it" meant that the hammer should be left or held down after it had been lowered upon the metal or casting to be crushed. It also appeared that the casting had been made brittle by subjecting it to great heat in the usual manner, and that when this order was given "the hammer descended down slowly until it came on the end of the casting and then in a little while the casting all crumbled away," and the accident happened. Held, that the

giving by the acting superintendent of this order, the possible execution of which under the circumstances he must have known might be attended with grave danger to the defendant's workmen under his command, would justify a finding that he was negligent.

TORT by the administratrix of the estate of Edward J. Carroll, late of Weymouth, for the conscious suffering and death of the plaintiff's intestate on August 22, 1908, when he was employed as a workman in the forge room of the defendant's shipbuilding works at Quincy, alleged to have been caused by an iron porter bar weighing about nine hundred and ninety pounds striking or falling upon the intestate when a steam hammer crushed a brass casting, in one of the holes of which the bar had been left protruding, the different counts of the declaration being described in the opinion. Writ dated January 18, 1909.

In the Superior Court the case was tried before Crosby, J. The substance of the evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that the plaintiff could not recover. The defendant also asked for certain instructions to the jury, among which was the following:

"9. If you find that Mr. O'Brien [the operator of the steam hammer] knew that the method of doing the work under the conditions existing at the time was improper, and yet that he carried out this method because of the orders of Mr. Bell [the foreman of the forge room,] the plaintiff cannot recover."

It appeared that the order given by Bell was "Hold it, Billy," and that "Billy" was O'Brien, who was operating the levers of the hammer. There was testimony that the words "hold it" had a special significance and meant that the hammer should be left or held down after it had been lowered upon the metal or casting, and that when this order was given "the hammer descended down slowly until it came on the end of the casting and then in a little while the casting all crumbled away."

The judge refused to rule that the plaintiff could not recover. He also refused to give the ninth instruction requested by the defendant, which is quoted above. Among other instructions he gave the following:

"If you find that the negligence of Mr. O'Brien caused the accident, the plaintiff cannot recover. That is, provided you find that the order given by Bell was not a negligent order.

"If you find that the order of Mr. Bell was a proper order and that the method of doing the work was proper and the accident happened through the negligence of Mr. O'Brien in carrying out the method, the plaintiff cannot recover.

"If you find that the accident happened through Mr. O'Brien's not carrying out the orders given him by Mr. Bell, the plaintiff cannot recover, if the order so given was a proper and not a negligent order."

The jury returned a verdict for the plaintiff in the sum of \$4,850; and the defendant alleged exceptions.

- J. Lowell & J. A. Lowell, for the defendant.
- F. G. Hayes, for the plaintiff.

BRALEY, J. The plaintiff's intestate, while employed by the defendant, received severe injuries causing his death after a considerable period of conscious suffering. Of the five counts of the declaration, the first at common law was waived, the third, fourth and fifth are immaterial to the exceptions because of the rulings in the defendant's favor, and the case went to the jury upon the second and third counts charging under the statute negligence, in the performance of his duties, of some person entrusted by the defendant with superintendence. R. L. c. 106, §§ 71, 72, as amended by St. of 1906, c. 370, now by codification St. of 1909, c. 514, §§ 127, 128. Bartley v. Boston & Northern Street Railway, 198 Mass. 163, 168.

The defendant concedes, that there was evidence for the jury as to the due care of the intestate, and that one Bell, the foreman of the forge room, was an acting superintendent, but contends that there was no evidence which warranted a finding that he was negligent. Murphy v. New York, New Haven, & Hartford Railroad, 187 Mass. 18. We are unable to adopt this view. The intestate with other workmen was engaged at the time of the accident in melting and breaking large brass castings. In the performance of the work when a casting had been heated to a temperature sufficient to make it brittle it was withdrawn and placed upon the die or anvil of a steam hammer and crushed. A casting having been heated to the necessary degree, the foreman ordered its removal to the hammer. The men thereupon inserted into an open space in the casting the end of a porter bar suspended by a chain from a movable crane. By interposing

their weight, and bearing down at the other end, to which a long piece of pipe had been attached, the leverage was sufficient to lift out the casting, when by aid of the crane it was swung around and placed under the hammer. It was after this had been done and while the men were still at the porter bar with the intestate as the "end man," that the foreman, who the jury could find knew of their position, ordered the operator to lower the hammer. The hammer weighing seventeen tons was at once lowered until it rested upon or struck the casting, which had become so fragile from the intense heat that it instantly crumbled, and the force of the impact or weight of the hammer falling upon the porter bar caused it so to vibrate, or "bound and rebound," as to break the chain and then to either strike or fall upon the intestate. It is plain from the details of the operation, that the accident could not have happened if the porter bar had been removed after the casting had been placed upon the anvil, and the plaintiff's experts, who were familiar with the proper method of reducing the casting, all agreed that this should have been done before the hammer descended. The testimony of the foreman warranted the inference that he not only knew that the casting must be heated until it was brittle or it could not be crushed, but also was familiar with the proper process. If the bar was not removed the danger to the men was obvious, and the present case is not an instance where, until the accident, there was no reasonable ground to anticipate what befell the intestate. The foreman testified, that he intended to follow the usual and safer way, and only to have the hammer come down sufficiently far to hold the casting in place, without resting the weight of the hammer upon it. But the effect of the order which he gave was susceptible of an entirely different interpretation upon the evidence, and was for the jury to determine. To give an order, the possible execution of which under such circumstances he must have known from his experience, if he had used ordinary precautions, might be attended with grave danger to the defendant's employees under his command and power of control, would justify a conclusion by the jury that he was negligent. Meagher v. Crawford Laundry Machinery Co. 187 Mass. 586. Robertson v. Hersey, 198 Mass. 528. Connolly v. Booth, 198 Mass. 577. Igo v. Boston Elevated Railway, 204 Mass. 197.

If his negligence was established, there is no question that the plaintiff had made out a case, and the defendant's requests so far as they were not given, were rightly denied.

Exceptions overruled.

ROBERT S. BRADLEY vs. MARY E. HAVEN & another, trustees.

Suffolk. January 18, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Contract, What constitutes. Statute of Frauds. Agency.

In a suit in equity against the owner of certain real estate for the specific perform-

ance of an alleged agreement of the defendant to sell the property to the plaintiff, the following facts appeared: An agent of the defendant offered the property to the plaintiff for a certain price in a letter which contained no reference to any rights of way. The plaintiff replied by the following telegram: "Letter received Close deal understand Rights of way are included as we talked." Replying to the telegram the agent wrote, in a letter dated on a September 2 but not received by the plaintiff until September 8, "The matter is closed and the rights of way, as I understand, are included as we talked over." On September 2, by a letter received by the plaintiff on the same day, the defendant declined to sell the property. There was no evidence to show that the agent's letter of September 2 was mailed before the plaintiff received the defendant's letter of that date. Held, that the plaintiff's telegram was not an acceptance of the offer of the agent, but was a counter offer, and that it did not appear that the acceptance by the agent of the counter offer was made before the defendant had declined to sell, and therefore that on that ground the suit properly might be dismissed. In a suit in equity against the owner of certain real estate called " the marsh " for the specific performance of an alleged agreement of the defendant to sell the property to the plaintiff, the following facts appeared: An agent of the defendant offered the property to the plaintiff for a certain price in a letter which contained no reference to any rights of way. The plaintiff replied by the following telegram: "Letter received Close deal understand Rights of way are included as we talked." Replying to the telegram the agent wrote: "The matter is closed and the rights of way, as I understand, are included as we talked over." The "rights of way" constituted an important part of the property being purchased. On evidence which warranted the findings, the justice who heard the case found that, while it was possible to ascertain by oral evidence what was meant by the "rights of way" referred to, it was not possible to ascertain by any other means, that "no rights of way had become so connected with the marsh as to have acquired a definite meaning," and that " this language was not employed by the parties to designate rights of way in a technical sense, but to indicate the fee of certain land outside the marsh subject to rights of passage owned by other people." Held, that there was no sufficient memorandum under the statute of frauds, R. L. c. 74, § 1, cl. 4, as to the rights of way; and therefore that the suit must be dismissed.

MORTON, J. This is a bill to compel the specific performance of a contract alleged to have been entered into by the defendants as trustees, with the plaintiff, for the sale and conveyance by them to him of a tract of land in Beverly, and also of the fee in certain private roads or rights of ways. There was a decree dismissing the bill with costs, and the plaintiff appealed. The evidence is all before us.

As the result of previous negotiations and interviews between the plaintiff and one Boardman who was, as the single justice * found, the duly authorized agent of the defendants, Boardman wrote to the plaintiff on August 28, 1908, offering to deed to him for \$70,000 a tract of land in Beverly belonging to the defendants as trustees and described in the letter as "the marsh." No mention was made in the letter of any rights of way. The plaintiff replied to this letter the next day, August 29, by telegram saying, "Letter received Close deal understand Rights of way are included as we talked." Under date of September 2 Boardman wrote to the plaintiff saying amongst other things, "The matter is closed and the rights of way, as I understand, are included as we talked over." This letter was not received. by the plaintiff until some time on September 3, nor until after he had received from one of the defendants. Miss Mary E. Haven, in the evening of September 2, a letter sent by her to him on that day, declining to sell the property. The single justice was unable to find when the letter from Boardman to the plaintiff under date of September 2 was put in the mail, and there is nothing in the evidence by which that can be determined. For aught that appears it may not have been mailed until after the plaintiff had received the letter sent by the defendant Mary E. Haven declining to sell. So far therefore as the plaintiff relies upon the acceptance by Boardman of his telegram in reply to Boardman's letter to him as constituting a written contract for the sale and purchase of the marsh and the rights of way, he fails to show that there was such acceptance before the authority of the agent in regard to the matter had been terminated by the letter sent to him by Miss Haven declining to sell. His telegram cannot be construed as an unqualified and unconditional

^{*} Rugg, J.

acceptance of the offer contained in the letter, but rather as in the nature of a counter offer. The offer in the letter was an offer of the marsh for \$70,000. Nothing was said, as already observed, about any rights of way. His acceptance was not of that offer pure and simple, but was coupled with the inclusion in the trade of certain rights of way, meaning the fee therein, but for which, as he himself testified, he would not have been willing to pay the price demanded. Until therefore there was an acceptance by the defendants or their duly authorized agent of the plaintiff's counter proposition no written agreement was entered into. The burden of proof was on the plaintiff to show such an acceptance which, as we have said, he failed to do, and the case might well be disposed of on that ground.

But we also think that there was no sufficient memorandum in writing to bring the case within the statute of frauds. single justice found that the tract known as "the marsh" was ascertainable and was commonly known by that name. But he found in effect that while it was possible to ascertain by oral evidence what was meant by the "rights of way" referred to, it was not possible to ascertain in any other way what was meant by that phrase. He also found that "no rights of way had become so connected with the marsh as to have acquired a definite meaning," and that "this language was not employed by the parties to designate rights of way in a technical sense, but to indicate the fee of certain land outside the marsh subject to rights of passage owned by other people." These findings were well warranted by the evidence, and it follows that while the description of the marsh land as "the marsh" would have been sufficient to warrant a decree in the plaintiff's favor if the trade had been confined to that, there is no sufficient memorandum in regard to the rights of way which constituted an important part of the property which the plaintiff was purchasing, and of which he seeks to compel a conveyance. The statute of frauds requires that the memorandum should "contain a description of the land sufficient for purposes of identification, when read in the light of all the circumstances of ownership of the property by the vendor." Harrigan v. Dodge, 200 Mass. 857, 859. Doherty v. Hill, 144 Mass. 465. Clark v. Chamberlin, 112 Mass. 19. Whelan v. Sullivan, 102 Mass. 204. In

the present case there was nothing in any memorandum by which the rights of way intended to be referred to could be identified, and it is well settled that "Parol testimony of a previous oral agreement, which is the only means of identification referred to in the memorandum, cannot be taken into consideration to complete it." Whelan v. Sullivan, supra, p. 206. Waterman v. Meigs, 4 Cush. 497. If the ways had constituted a part of the marsh either by reason of their use in connection with it or the configuration of the land, or for any other reason, and it was commonly so known and understood, oral evidence of those facts would have been competent because it would have tended to identify the tract described in the memorandum, and when so identified the description in the memorandum would have applied to it and would have been sufficient and would have included whatever was comprised in "the marsh." But as already observed, the single justice found that no rights of way had become connected with the marsh and that those words were used not in a technical sense, but to indicate the fee in lands outside the marsh. It follows that they were not included in the description of the tract as the marsh, and that there was therefore no sufficient memorandum of them in writing.

There is nothing, we think, in any of the subsequent correspondence on the part of Mr. Minot* which helps the plaintiff. Oral testimony would still be required to show what rights of way were referred to in the memorandum relied upon, even if we assume without deciding that the correspondence could be resorted to for the purpose of helping to identify the land described in the memorandum. Whether it is true, as contended by the defendants, that separate writings can be resorted to only so far as they appear to have relation to the same contract (as to

^{*} After the plaintiff received on September 2, 1908, the letter from Miss Haven above referred to, the plaintiff wrote to her some letters, which she referred to Robert S. Minot, Esquire, giving him power of attorney in the matter. Mr. Minot thereupon wrote to the plaintiff a letter which contained a definite description of "the marsh" by metes and bounds, and, enclosed with it, memoranda as to certain rights of way and of boating and bathing in connection therewith and as to certain restrictions, subject to which the owners would sell, and also a plan of the locus. The letter did not admit that a binding contract had been made.

which see Freeland v. Ritz, 154 Mass. 257, and Williams v. Smith, 161 Mass. 248), it is not necessary to consider.

Decree affirmed with costs.

R. B. Stone, (R. Stone with him,) for the plaintiff.

H. Parker, (H. H. Fuller with him,) for the defendants.

CORNELIUS MUNGOVAN vs. MICHAEL O'KEEFFE.

Suffolk. January 19, 1911. — March 3, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, Employer's liability.

Sugar barrels piled one upon another at the side of a passageway in a grocery, where they are placed temporarily among other goods, are not a part of the ways of the proprietor of the store as that word is used in R. L. c. 106, § 71, cl. 1, now St. 1909, c. 514, § 127, cl. 1.

At the trial of an action against the proprietor of a grocery by an employee therein to recover for personal injuries caused by the falling upon the plaintiff of a sugar barrel which was at the side of a passageway along which the plaintiff in the performance of his duties was rolling another barrel, there was evidence tending to show that the barrel was piled end for end upon another, its bottom not resting on the rim of the lower barrel, but at an angle upon its head, that the usual way of piling sugar barrels was upon their sides, that the floor where the barrels stood was being jarred by heavy trucking at the time when the barrel fell, and was so jarred whenever there was heavy trucking, that the piling of goods in the defendant's store was in charge of a superintendent and that the plaintiff first noticed just before the accident that the barrel which fell upon him was piled in an unusual way. There was no evidence that the superintendent was present when the barrel that fell upon the plaintiff was piled, but it appeared that it had been delivered at the store five days before. Held, that the questions, whether the plaintiff assumed the risk of the injury, and whether the superintendent was negligent, were for the jury.

TORT for personal injuries received while the plaintiff was in the employ of the defendant in a grocery and due to the falling upon him of a barrel of sugar. Writ dated September 16, 1907.

The declaration contained two counts, the first under R. L. c. 106, § 71, cl. 2, alleging negligence of one Caswell, a superintendent of the defendant, and the second under cl. 1 alleging a defect in the "ways connected with and used in the business of

the defendant, which arose from and had not been discovered or remedied in consequence of the negligence of . . . Caswell, a person in the service of the defendant who was entrusted by the defendant with the duty of seeing that the ways were in proper condition."

In the Superior Court the case was tried before White, J. The plaintiff's evidence tended to show that, at the time of the accident and for about four months before, one Caswell was in charge of the receiving department of the defendant's store and directed how goods received should be piled away; that on a Saturday certain sugar barrels were received and were piled away, and that the plaintiff did not see them piled away and did not know who piled them; that on the following Thursday the plaintiff was directed to get one of the barrels and for that purpose went along a passageway, where goods were piled on each side, and found a barrel on its side and back of it two barrels, set on end one on top of the other, the one on top not being set squarely on the one beneath, but with its rim resting partly on the head of the under barrel; that as the plaintiff was trying to move out the barrel which was in front of the two so piled, the head of the lower barrel crushed in and the upper barrel fell against the plaintiff; that the floor upon which the barrels stood "used to go up and down like, shake, something of the sort," every time there was any heavy trucking "there," and that at the time of the accident there was some trucking being done; that the usual way to pile sugar barrels was on their sides.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict generally for the defendant; and the plaintiff alleged exceptions.

- A. K. Cohen, for the plaintiff.
- F. N. Nay, for the defendant.

BRALEY, J. The position of the barrels of sugar, one upon the other rim to rim, by which the weight of the upper crushed in the head of the lower barrel and then fell upon the plaintiff, did not constitute a defect in the ways, works or machinery of the defendant. The condition was of a temporary character arising from a transitory cause, and the verdict in the defendant's favor on the second count must stand. Carroll v. Willcutt, VOL. 208.

163 Mass. 221. Whittaker v. Bent, 167 Mass. 588. Feeney v. York Manuf. Co. 189 Mass. 886.

But under the first count the evidence would have warranted a finding by the jury that Caswell, who was the defendant's foreman, had been entrusted with superintendence under R. L. c. 106, § 71, cl. 2, now by codification St. 1909, c. 514, § 127, cl. 2. Murphy v. New York, New Haven, & Hartford Railroad, 187 Mass. 18. If the breaking of the barrel head caused the plaintiff's injuries, as there seems to have been no doubt was tho fact, the jury from their common knowledge, as well as from the evidence of the method usually followed by the defendant, could say that, when properly stored, the barrels should have rested upon their sides, and should not have been tiered end for end, one upon the other. The warehouse was used for the general storage of commodities in which the defendant dealt, and as sales were made the plaintiff among other employees took out the merchandise. It could have been found that while doing so the jar from rolling out another barrel of sugar in proximity to it, caused the barrel which fell to topple over. Under these conditions it could not be ruled as matter of law that the foreman, who generally directed the placing of barrels and storage of goods, and who knew of the general course of business, was not called upon in the exercise of reasonable care to anticipate that there might be danger of a collapse when the plaintiff had to remove contiguous merchandise. If by proper oversight he could have guarded against it, his failure to act was evidence for the jury tending to prove that he was negligent. Proulx v. J. W. Bishop Co. 204 Mass. 130. Rooney v. Boston of Maine Railroad, ante, 106.

Nor was the plaintiff's conduct as matter of law careless. It appears that his attention was not called to the position of the barrels until just as the accident occurred. The jury were to determine how far the presumption, that the employer or his representative had discharged the duty of furnishing a reasonably safe place in which to perform the work, should have been relied upon by the plaintiff. Obvious risks only are assumed by contract, but when the defense of assumption of risk by conduct as in the case at bar is invoked, knowledge of the danger by the employee is not alone sufficient to bar recovery. Moylon v. D. S. McDonald Co. 188 Mass. 499, 501, and

cases cited. Jellow v. Fore River Ship Building Co. 201 Mass. 464, 467.

The exceptions, therefore, must be sustained, but the verdict is set aside only as to the first count, on which there must be a new trial.

So ordered.

ELIZABETH G. O'NEIL vs. CITY OF CHELSEA.

Suffolk. January 19, 20, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Way, Public: defect.

If a city, while constructing a trench in the highway beneath the tracks of a street railway, does not close the street to travel and relies on an employee of the corporation operating the street railway to warn travellers against falling into the trench and to keep it properly guarded, the city is liable under R. L. c. 51, § 18, to a traveller who is injured from falling into the trench by reason of a failure of the employee of the street railway company to do his duty.

At the trial of an action under R. L. c. 51, § 18, by a traveller against a city for personal injuries caused by the plaintiff falling into a trench dug by the defendant in a public street, there was evidence tending to show that the defendant had not closed the street to public travel, that for several days it had been excavating the trench along a street through which the plaintiff passed daily, that the plaintiff had observed that as the work progressed the trench approached street railway tracks on an intersecting street, and that on the morning of the accident he noticed that it was dangerous to walk between the ditch and the tracks; that during the day of the accident the trench had been dug under the street railway tracks, that lights and barriers had been placed to warn persons approaching from every direction, that a barrier had been placed across the tracks where the trench was and that an employee of the street railway company had been left on guard to remove and replace the barrier for the passing of cars and to warn travellers on the street. It did not appear whether there was any arrangement between the city and the street railway company as to the guard's employment. The plaintiff returned from work early in a December evening in a street car which the guard, having removed the barrier, stopped fifteen feet before it reached the trench. The guard did not replace the barrier at once after the car had passed, but stopped to watch some travellers approaching from another street about three hundred and forty feet away. The plaintiff in the meantime had left the car and was walking behind it to reach a place where he could gain access to the sidewalk when, not seeing the trench, he fell into it. Held, that the questions, whether negligence of the plaintiff contributed to the accident, or whether the accident was caused solely by a defect arising from negligence of the watchman, for which the city was responsible, were for the jury.

RUGG, J. This is an action to recover damages for injuries alleged to have been received by a traveller in the exercise of

due care by reason of a defect in a public way. The undisputed facts appear to be that the defendant had been for several days excavating a trench along Garfield Avenue, and during the day of the accident had continued the excavation across the end of an intersecting street, called Sagamore Avenue, under street railway tracks, which ran from Sagamore Avenue into Garfield Avenue. The plaintiff walked beside this trench twice each day on her way to and from the car at the corner of Sagamore Avenue, and noticed that it was gradually approaching the railway tracks and was guarded by lanterns at night. On the morning of the accident she observed that it was dangerous to walk between it and the track.

Early in a December evening, as she alighted from a street car on Sagamore Avenue, finding dirt piled between the car and sidewalk, she followed the car, and walking between the rails toward Garfield Avenue, fell into the trench, which during the day had been extended under the tracks. She saw no lanterns between the tracks, and did not see the trench. The trench was guarded from different points of approach by several wooden horses, upon which were lanterns. One of these was directly across the street railway tracks, and had been removed by an employee of the railway company to permit the progress of the car from which the plaintiff had alighted, and had not been replaced before she reached the trench. This employee of the railway company was the only person about the trench, and it seems to have been his duty to care for the guards and warn travellers of the danger.

There was sufficient evidence to warrant a finding of due care on the part of the plaintiff. She was walking after nightfall over a part of the highway which was obviously open to travel by the street car, and which bore no sign of danger on its surface except the excavation itself. This might have been found to have been so obscured by shadows or darkness as not to attract attention. There is nothing upon this point to distinguish this from numerous other trench cases, where the due care of the plaintiff has been held to be for the jury. *Prentiss* v. *Boston*, 112 Mass. 43. *Norwood* v. *Somerville*, 159 Mass. 105. *Benton* 112 Mass. 43.



^{*} In the Superior Court the case was tried before Dana, J. The jury found for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

nett v. Everett, 191 Mass. 364. Picquett v. Wellington-Wild Coal Co. 200 Mass. 470. Dix v. Old Colony Street Railway, 202 Mass. 518. Torphy v. Fall River, 188 Mass. 310. Hyde v. Boston, 186 Mass. 115. Block v. Worcester, 186 Mass. 526. Gustafsen v. Washburn & Moen Manuf. Co. 153 Mass. 468. White v. Boston, 122 Mass. 491. O'Neil v. Hanscom, 175 Mass. 318. Fox v. Chelsea, 171 Mass. 297. Although the plaintiff might have reasoned that because the work of digging had been progressing in the direction of the tracks, it was likely to cross them if continued on the day of the accident with the same expedition as before, yet she had no knowledge respecting it, and was not bound to speculate as to possible dangers when no indication of any appeared before her. See Thompson v. Bolton, 197 Mass. 811 and cases cited; Winship v. Boston, 201 Mass. 273.

There was also ground for a finding of negligence on the part of the defendant. There is no question of a serious defect in the way nor of knowledge of it by the defendant. It may be assumed that the defect in the way was caused by a necessary public work. The way had not been closed to travel by vote of the city council and due notice of such action, whereby the statutory liability of the defendant might be suspended for a time, and therefore its obligation was of the second class described by Loring, J., in Jones v. Collins, 188 Mass. 53, namely, to use reasonable care and diligence in protecting travellers from the danger. Connelly v. Boston, 206 Mass. 4. The evidence does not disclose what arrangement, if any, was made between the defendant and the street railway company as to guarding and warning the public of the excavation. If the defendant relied on the employees of the railway to do this, it is liable for any failure on their part. Stoliker v. Boston, 204 Mass. 522, 587. Whether this duty had been performed depended upon the character of the street, the amount and nature of travel upon it, the hour of the day, the degree of light, the extent of the danger, the kind of barriers, safeguards and warnings provided, and all the other attendant conditions. It was a question of fact whether the watchman of the railway company was negligent in signalling the car to stop fifteen feet from the trench, because he thought passengers might get off and go around the car to the opposite sidewalk and in not replacing immediately the lighted wooden horse, which he had removed to enable the car to pass, in time to prevent the plaintiff from falling into the trench. He testified that he was watching other travellers,* but it was for the jury to determine whether his first duty was not to replace the wooden horse instantly after the passing of the car. Blessington v. Boston, 153 Mass. 409. The defendant relies strongly upon Martin v. Chelsea, 175 Mass. But that case is distinguishable in that there the plaintiff was doing an extraordinary act in daylight, which although not pronounced negligent was held to be something which could not reasonably be expected to happen. The excavation was a small one, amply surrounded by warning signs, and guarded by a watchman. These circumstances were held not to present any evidence of want of the "reasonable care and diligence" required by R. L. c. 51, § 18. The present plaintiff might have been found to have been travelling in a manner, place and direction, which ought to have been anticipated, in such darkness as would not reveal her danger, to a pitfall temporarily unguarded, at a time when the attention of the watchman nominally there to warn was unwarrantably diverted.

Exceptions overruled.

- S. R. Cutler, (H. W. James with him,) for the defendant.
- J. B. Dore, for the plaintiff.

The guard testified "that just before the accident a wagon was coming down Webster Avenue [otherwise known as Revere Beach Parkway, a street parallel to Sagamore Avenue and about three hundred and forty feet from it] in practically the opposite direction in which the car was coming at the same time, and that he was watching both of them at the same time that he stopped the car about fifteen feet from the excavation so that the rear endof the car was about forty feet away from the trench; the team on Webster Avenue got by and then there were two people coming from Webster Avenue and he was looking around at them when the car came over the trench and as it got around he turned and saw the plaintiff falling into the hole; that when the plaintiff fell into the hole the horse which had been across the tracks and had been laid aside to let the car pass was about three feet from the hole on the side of the street; that two or three other people got off the car when it stopped, and he saw them pass over towards the sidewalk; that after warning the barrel team he looked around quickly and looked down Garfield Avenue and saw the two people mentioned above coming up towards him and very near the trench; that at that time he didn't see any other object in the street except the two people, and that in the meantime the car passed around the turn."

CHARLES W. RICHARDSON & others, executors, vs. Essex Institute & others.

SAME vs. HARVARD COLLEGE & others.

Essex. January 20, 1911. — March 3, 1911.

Present: Knowlton, C. J., Morton, Brally, & Rugg, JJ.

Charity. Devise and Legacy.

If a gift is made by will to a certain charitable, benevolent, literary or educational corporation and the gift constitutes a public charity irrespective of whether the corporation designated accepts it or not, the charity will not be allowed to fail for want of a trustee to administer it.

Each of two sisters owned a one half interest in certain real estate and personal property. Each made a will, which, without mentioning the will of the other, gave all of her property to her sister for life, and, after her sister's death, by a paragraph containing over seven hundred words which excepting for trifling variations were identical with the words used in her sister's will, gave her one half interest in the real estate and personal property above mentioned to a certain corporation for charitable purposes. After the death of both sisters, in suits in equity by the executor of the will of one and the administrator with the will annexed of the estate of the other for instructions, it was held, that there was no doubt that a joint scheme was contemplated by the two sisters, and that it was not impossible to administer the separate gifts as one public charity.

The mere fact that a gift for a charitable purpose is intended by the donor also as a private memorial to members of his family does not impair its public character or legal validity.

The owner of a house, which, although to some extent remodelled, was a good example of the architecture of the Revolutionary period, which stood in the midst of ample grounds and gardens and was furnished with many articles constituting a collection of household antiques, the house and its contents being of educational interest and value as a kind of museum and the grounds being so situated and of such character as to be adapted for use as a small park or open space and, so used, of substantial benefit to the public, by his will gave the house and grounds, gardens and contents of the house to a corporation, directing that "the house may not in the least degree be dismantled, but stand forever as a memorial to the family of" an ancestor of the testator, that it be kept open to visitors who might wish to see the collection of household antiques, with a custodian and caretaker in charge, that there be no public meetings or crowded receptions, that the gardens be used for the cultivation of what might be useful in the study of botany and that the grounds be kept open for the enjoyment of the public so far as practicable and be freely used by all students of botany whether in public or private schools. Provision was made for a possible extension of the grounds by purchase of land adjoining, and for the employment of an instructor and for free lectures in botany subject only to such rules and conditions as might be deemed necessary for the best interests of the classes. Held, that the gift was for educational and other purposes and came within the

scope of what constitutes a public charity, although the motive in making it was to establish a perpetual memorial to the testator's family.

Gifts for public educational purposes constitute public charities.

Two bills in equity for instructions, filed in the Probate Court for the county of Essex on October 15, 1909, respectively by the executors of the will of Eliza O. Ropes and by the administrators with the will annexed of Mary P. Ropes, both late of Salem and sisters.

The petitioners alleged in substance that the Essex Institute declined to accept the trusts created by the following provisions in the wills, and sought instructions as to the disposition of the property. Material portions of the wills were as follows:

"I give and bequeath to my sister . . . all the property both real and personal of which I die possessed, to have and to hold the same, so long as she shall live and to invest or dispose of the income as she may wish.

- "Upon the decease of my sister . . . I desire that the following disposition shall be made of my real and personal property.
- "1. To the Essex Institute, Salem, Massachusetts, I give all my one half interest in the house No. 318 Essex street, the Nathaniel Ropes homestead for four generations, with the ground under and the garden attached thereto, my one half interest also in the furniture, carpets, silver-ware, china, portraits and other pictures, books, trunk of antique clothing, watches, jewelry, brica-brac, etc., etc., that the house may not in the least degree be dismantled but stand forever as a memorial to the family of Nathaniel Ropes. It is my wish that the house shall be kept open to visitors who may wish to see the collection of household antiques and a custodian shall live in the house for the care and preservation of the same and its contents. It is my wish that no public meetings or crowded receptions shall be held in the house and that visitors shall not be admitted in crowds. is my wish that the garden attached to the house shall be used for the cultivation of such flowers, plants, shrubs, trees, etc., as may be useful in the study of botany, leaving always the forest



^{*} The following quotation is from the will of Eliza O. Ropes. In the will of Mary P. Ropes, the same provisions are made, mutatis mutandis, in practically identical words.

trees on the fore-ground as they have been for many years and the grounds shall be kept open for the enjoyment of the public so far as practicable and shall be freely used by all students of botany whether in public schools or private classes. To encourage an interest in the study of botany in the city of Salem, it is my wish that as good an instructor as can be obtained shall hold classes in the house annually for as many weeks or for as many lectures as the management of the Institute may approve, the class in no instance to exceed the capacity of one of the eastern rooms upon the lower floor of the house. As I shall hereafter provide for the expense of these lectures, it is my wish that the instruction shall be free to all who desire to benefit by it, the management of the Institute making only such conditions and rules as may be deemed necessary in furthering the best interests of the class. In order that the Essex Institute may, without financial embarrassment, carry out the intention of the testatrix in making the above bequests, I give and bequeath to the Essex Institute the following real and personal property, the income of which to be applied to the support of the objects named above.

- "a. All my one half interest in the house next east of the homestead, with the ground under and the yard attached thereto known as No. 316 Essex Street. If at the expiration of three years or any time thereafter, the management of the Essex Institute shall find that there has been a sufficient accumulation of funds to provide for the perpetual care of the homestead and grounds, the house No. 316 Essex Street may be taken down and the grounds thrown open to improve the appearance of the street.
- "b. All my one half interest in seven houses on Broad Street, Nos. 19\frac{1}{2} to 25\frac{1}{4} with ground under and attached.
- "All my one half interest in six houses on Hathorne street, Nos. $5\frac{1}{2}$ to $9\frac{1}{2}$ in all five and No. 8 on the west side of the street with ground under and attached to all the houses.
- "All my one half interest in Orne Square, the houses on both sides of the street with the ground under and attached to all the houses.
- "My one half interest in a lot of land in Danvers, Essex County, Massachusetts.
 - "My one half interest in the Boston Water Power Stock.

"All my shares of stock in the Edison Electric Illuminating Company of Boston.

"The income of the above investments shall be applied to the care and preservation of the homestead and grounds No. 818 Essex street and should there be a surplus annually or at the end of any fiscal year, it shall go toward the establishment of a fund to meet any extraordinary expense that may arise in the future, or to purchase adjoining property should there be an opportunity so that the lot may acquire something of its original dimensions and finally open through to Federal Street.

"c. My Old Colony Railroad Bonds, six in number (\$6000.00), the income to be applied to the course of lectures or class instruction in botany. The above gifts to the Essex Institute are on the express condition that said Essex Institute substantially carry out and fulfill the above directions and wishes of Testatrix as above set forth."

In the Probate Court, *Harmon*, J., made a decree that the gifts constituted valid public charities, and that he would appoint trustees to administer them "as nearly as possible according to the intent and purpose" of the testatrixes.

On appeal to this court, the cases were heard by *Morton*, J., upon the pleadings, an agreed statement of facts and a view, it being agreed that "all proper inferences of fact may be drawn from the facts agreed upon and from those disclosed by a view."

From the plan, the pleadings and agreed facts, it appeared that Mary P. Ropes died on September 29, 1903, and that Eliza O. Ropes died on April 10, 1907; that the sisters were tenants in common of the premises described in the provisions of their wills above quoted, each owning one undivided half; that the value of the real estate devised by each sister to the Essex Institute was about \$57,000, and that the value of the personal estate bequeathed was about \$20,000; that the premises No. 318 Essex Street are situated on the principal street of Salem and in the centre of the city, the area being 34,310 square feet.

"Some of the furniture in the house upon the premises No. 818 Essex Street belongs to the class known as antique. One piece and possibly some others may have come from the Revolutionary period. This furniture is mainly solid mahogany, in excellent condition. A larger part of the furniture is more

modern, belonging to the period from 1840 to 1870, and some to a later period. This furniture is good of its class and of a kind which was suitable for and used by families of means and refinement occupying residences of the size and type of this one. The furniture is in good condition. The mahogany cabinets with glass doors referred to in the amendment to the petitions contain a collection of Canton ware and Nanking ware, consisting of four hundred and ninety-nine pieces, in excellent condition, and good specimens. The cut glass is not of a kind unusual in households of the size and condition of this.

"Neither testatrix was devoted to botanical pursuits or studies."

The single justice, after taking a view, in addition to the facts agreed upon, found the following facts:

"The grounds are so situated and of such character as to be adapted for use as a small public park or open space and so used would be of substantial benefit to the public. These grounds constitute the 'garden attached to the house,' referred to in the wills, and can be used for the cultivation of such flowers, plants, shrubs, trees, etc., as may be useful in the study of botany, as prescribed by the wills, though the area is not sufficient to permit such cultivation on a large scale.

"The house is a good example of the architecture of the Revolutionary period,' except that it has to some extent been remodelled. It now retains, however, the general appearance and many of the characteristics of a house of that period. One or more of the easterly rooms upon the lower floor of the house, though furnished for purposes of a dwelling house, could be used for lectures to small classes.

"A considerable part of the furniture in the house is of the class known as antique. Among the pieces are high-boys, low-boys, high post bedsteads, a hall clock, tables and chairs. Many of these pieces would be suitable and proper for preservation in a museum of antique furniture. Though there is considerable furniture which is more modern, the general appearance of the house is of a house furnished in the old fashioned manner. The collection of Canton ware and Nanking ware is quite large and is suitable for preservation in a museum and would be interesting to those engaged in the study of such matters and would

perhaps excite some interest in those who were not. The house and its contents, as it now stands, would have an educational interest and value as a kind of museum."

With the consent of the parties the single justice reported the cases to the full court for determination.

- C. W. Richardson, for the plaintiffs.
- L. D. Brandeis, for the Urbana New Church University.
- F. T. Field, Assistant Attorney General, for the Commonwealth.

MORTON, J. The principal question in these cases is whether the gifts constitute a public charity. The Essex Institute, which was named as trustee, has declined to accept the trust. But there is nothing to show that the continuance of the trust, if there is one, was in any way dependent on the acceptance of it by the Essex Institute. And it is well settled that in such a case a charity will not be allowed to fail for want of a trustee to administer it. Fellows v. Miner, 119 Mass. 541. Hubbard v. Worcester Art Museum, 194 Mass. 280, 290.

There is another preliminary question. So far as these cases are concerned, each will disposes of what was almost wholly an undivided half interest in property held by the two as tenants There is no reference in either will to the other in common. and there is no provision in either will for acquiring the remaining half interest, or any part thereof. But we think that there can be no doubt, if that is material, that a joint scheme was contemplated by the signers of the two wills. Each provided for the appointment of the same trustee, and each, with a few trifling verbal differences, made the same disposition of this portion of her estate. What the result would have been if the joint purpose had failed as to one half of the property by reason of the incapacity of one of them to make a will, for instance, or from some other cause, we need not now consider. As the cases stand, if the gifts constitute a public charity we do not see any such impossibility of performance as to defeat it. The fact that one half of the property is or may be in the hands of one trustee and the other half in the hands of another trustee does not, it seems to us, present insuperable difficulties of administration. The Probate Court can appoint one or more trustees and remove them and appoint others in their stead, as circumstances and a

due regard to the interests and objects of the trust may seem to require.

If the question were whether, as stated in their brief by counsel for the Urbana New Church University, "a bequest to the Essex Institute of an undivided half interest in a homestead to 'stand forever as a memorial to the family of Nathaniel Ropes,' is a valid gift to charitable uses," we should have a great deal of diffiulty in discovering anything in the gift which constituted a public charity. But while the motive of the gift was no doubt the establishment of "a memorial to the family of Nathaniel Ropes," we cannot say that the manner in which the purpose was to be carried into effect did not impress upon the gift the character of a charitable use. The mere fact that a charity is also intended as a private memorial does not impair its public character or legal validity. Jones v. Habersham, 107 U. S. 174, 189.

The will (we speak of the two as one) provides that the house shall be kept open to visitors wishing to see the collection of household antiques, though the testatrix directs that no public meetings or crowded receptions shall be held in the house, and that visitors shall not be admitted in crowds. But admission is So far as these directions are concerned there is nothing in them inconsistent with a public charity. It is also provided that the garden attached to the house shall be used for the cultivation of such flowers, plants, shrubs, trees, etc., as may be useful in the study of botany, and the grounds shall be kept open for the enjoyment of the public so far as practicable, and shall be freely used by all students of botany whether in public or private schools. Provision is also made for the employment of an instructor in botany in order to encourage the study of botany in Salem, and that the lectures shall be free to all subject only to such conditions and rules as may be deemed necessary for the best interests of the classes. There is likewise provision for a possible extension of the grounds by the purchase of adjoining property. In addition to the above it is found that though the house has to some extent been remodelled, it is a good example of the architecture of the Revolutionary period; and it is further found that the house and its contents, as it stands now, "would have an educational interest and value as

a kind of museum"; and that "the grounds are so situated and of such character as to be adapted for use as a small public park or open space and so used would be of substantial benefit to the public."

It is well settled that gifts for public educational purposes constitute public charities (Drury v. Natick, 10 Allen, 169), and we do not see how it can be said that the gift in this case was not for educational and other purposes coming within the scope of what constitutes a public charity though the motive in making it was, as already observed, to establish a perpetual memorial to the Ropes family. Free classes for instruction in botany are provided for and a botanical garden is also provided for the free use of all students of botany whether in public schools or private classes. The gifts are none the less public and charitable because the benefits are in part to be enjoyed only by residents of Salem, if they are so limited, which we do not decide. Bartlett, petitioner, 163 Mass. 509. The house itself and its contents, it is found, have an educational value and interest as a kind of museum. There is no limit to the way in which instruction may be given or useful information may be imparted, and no rule can be laid down for all cases as to what shall or shall not be regarded as educational in the sense in which that word is used in connection with public charities. We cannot say that the maintenance of the house and its contents, as a kind of museum open to free public admission would not have such educational value as to constitute it a public charity, though if the case stood on that alone we should regard it as open to more question. In addition it is to be observed that the grounds are to be used as an open space or public park, and it is well settled that a gift for a public park constitutes a public charity. Bartlett, petitioner, supra.

The result is that we think that the decree of the Probate Court should be affirmed.

So ordered.



Annie M. Hale & another, executors, vs. H. Mortimer Herring & others.

Bristol. January 23, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Devise and Legacy. Trust. Rule against Perpetuities.

- A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive a, one seventh undivided interest in the business "provided that if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." Held, that the clause was not void as contrary to the rule against perpetuities.
- A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, a second survived the testator but died before the debts of the estate were paid; and the third, after the debts of the estate were paid but before the accumulation of one seventh of the profits of the business equalled one seventh of the appraised value of the business, demanded a transfer of a one seventh interest in the business. Held, that no such transfer should be made.
- A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if



either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, and a second survived the testator but died before the debta of the estate were paid. Held, that neither the first nor the estate of the second of such two beneficiaries was entitled to any share of the business or of its profits. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account. . . . All book accounts, stock, &c., apper-

taining to said business are to be included in the appraisal of it, subject to the payment of my debts, which are to be first paid from said business." *Held*, that the son and the daughter were not entitled to draw anything from the profits of

the business until the debts were paid. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the sou and the daughter should receive a one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account. I direct my said executors to invest any surplus profits not needed in said business for the benefit of said parties in some safe and secure manner. All book accounts, stock &c., appertaining to said business are to be included in the appraisal of it, subject to the payment of my debts, which are to be first paid from said business." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, a second survived the testator but died before the debts of the estate were paid. The third remained in the business. On a bill by the executor for instructions as to how the profits should be credited and in what manner the accounts should be kept, it was held, that debts of the testator first should be paid, that thereafter five accounts should be kept, each of which should be credited each year with a one seventh part of the profits until the last of the three persons other than the son and daughter dies or retires from the business, or until the amount so credited to his account equals one seventh of the appraised value of the business. Upon the happening of either of those contingencies and the conveyance to him of one seventh part or interest in the business or the drawing out by him or by his estate of the amount of profits credited to his account, the trust will terminate.

In the meantime, if the shares of the income to be credited as aforesaid are not needed in the business, they must be invested, in accordance with the direction of the testator, in some safe and secure manner for the benefit of the parties interested.

MORTON, J. This is a bill in equity * for instructions in regard to the construction of the seventh clause of the will of Oscar M. Draper. The clause is as follows: "Seventh, It is my wish and I hereby direct my executors to carry on my business in the manner I have heretofore done; and I direct that one-seventh part of the profits of each year's business shall be credited to the acount of H. Mortimer Herring, one-seventh to the account of M. J. Dunn, one-seventh to the account of O. B. Bestor, oneseventh to [the] account of Annie M. Hale, and one-seventh to the account of Raymond V. Draper; said Annie M. Hale and said Raymond V. Draper shall each be entitled to draw one-seventh part of the annual profits of said business. Said one-seventh parts of the profits aforesaid are to be credited to the said accounts, until the amount of each account shall equal one-seventh part of the appraised value of said business, and thereupon my executors shall convey to H. Mortimer Herring, to M. J. Dunn and to O. B. Bestor, each, one undivided seventh part or interest in said business; provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account.

"I direct my said executors to invest any surplus profits not needed in said business for the benefit of said parties in some safe and secure manner. All book accounts, stock, &c., appertaining to said business are to be included in the appraisal of it, subject to the payment of my debts, which are to be first paid from said business."

The case was heard by a single justice who filed a memorandum of his rulings in detail and ordered that a decree be entered in accordance therewith, but at the request of the parties reported the case to this court. If the rulings were right, a decree is to be entered accordingly. We think that the rulings were correct.

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[•] Filed in the Supreme Judicial Court on November 29, 1909, where it was heard by Rugg, J.

It is admitted or found that the debts of the estate have been paid, but there has been no substantial accumulation of profits beyond that; that M. J. Dunn above-named severed his connection with the business before the testator's death, and, after the allowance of the will, transferred to Edwin E. Hale, one of the defendants, all his interest under the will in and to the estate of the testator; that O. B. Bestor named in said seventh clause died in 1902, after the testator but before the debts due from the estate had been paid; and that Raymond V. Draper has transferred his interest in trust to the defendant Fred H. Williams. Herring is still living and is still connected with the business and contends that he is entitled to a transfer of a one seventh interest therein.

The first question is whether the clause is void under the rule against perpetuities or in restraint of alienation. The persons named as beneficiaries were all living at the death of the testator and it is plain that the interests of the legatees vested, if at all, during their lives, and that there has been no time since the death of the testator when the property could not have been conveyed by the joint action of all parties interested. The clause is therefore valid. We do not deem it necessary to consider whether the question became res adjudicata in consequence of proceedings in the Probate Court that were not appealed from.*

The next question relates to the right of Herring to demand a transfer of one seventh part or interest in the business. By the clause in question the testator directed his executors to carry on the business as he had done and, subject to the payment of his debts, to credit to the accounts of Herring, Dunn, Bestor, Annie M. Hale and Raymond V. Draper each one seventh part of the profits of each year's business. Said Annie M. Hale and Raymond V. Draper were each to be entitled to draw one seventh part of the annual profits. The profits to be credited to the accounts were to be so credited until the amount of each account should equal one seventh of the appraised value of the business, when the executors were to convey to Herring, Dunn and Bestor each one undivided seventh part in the business; provided that if



^{*} Under a previous bill for instructions, the Probate Court had entered a decree that the clause was valid.

either of "said parties," meaning thereby, we think, either Herring, Bestor or Dunn, should die or desire to retire from the business he or his executors or administrators should be entitled to draw the amount of profits then credited to his account. It is plain, we think, that Herring is not now entitled to the transfer of an undivided seventh part or interest in the business. The testator's intention clearly was that there should be no transfer until each account was equal to one seventh of the appraised value of the business, though if either of the parties died or desired to retire from the business he or his executors or administrators would be entitled to draw out the amount then credited to his account.

A question is presented as to what, if any, interest Edwin E. Hale takes by virtue of the transfer to him by M. J. Dunn of his interest in the estate. Dunn was connected with the business when the will was executed, but severed his connection with it before the testator's death. Manifestly, we think, the condition of things contemplated by the testator as necessary to exist in order to vest any interest in the business or profits in Dunn did not exist at the time of the attempted transfer by him to Hale and nothing therefore passed by it. He had nothing which he could transfer. The same is true of O. B. Bestor at the time of his death.

Another question presented is whether Annie M. Hale and Raymond V. Draper, children of the testator, are or are not entitled each to draw one seventh of the annual profits of the business before the debts are paid. There is ground for the argument that it was not the intention of the testator to postpone payment to them till that time arrived. But the scheme of the testator as expressed in the will seems to have been that the executors should carry on the business as he had carried it on till the debts were paid, and that then one seventh of the annual profits should be credited each year to each of the five accounts named and Annie M. Hale and Raymond V. Draper should each be entitled each year to draw one seventh of the profits. This appears, we think, from the direction with which the clause concludes that the executors are to include in the appraisal "all book accounts, stock, &c., appertaining to said business . . . subject to the payment of my debts, which

are to be first paid from said business," as well as from what is contained earlier in the clause. The direction is express that all his debts are to be first paid from the business. It is possible that the construction might be different if the facts relating to the situation and circumstances of the testator and his family appeared. But there is nothing in the record pertaining thereto. The result is that Annie M. Hale and Raymond V. Draper are not entitled to draw any of the profits before the debts are paid.

Lastly, in view of the conflicting claims that are made, the executors desire to be instructed how the profits shall be credited and in what manner the accounts shall be kept. It may be well doubted whether those are matters upon which the plaintiffs are entitled to instructions, but we nevertheless proceed to consider them. The executors are to hold the property in trust and carry on the business and pay first the testator's debts, if they have not been paid, though we understand, as already observed, that that has been done. After the debts are paid they are to permit the two children, as we construe the will, to draw annually one seventh each of the profits. If the debts have been paid or, if not, after they are paid, five accounts will have to be kept, as they would have been if Bestor and Dunn had continued to be connected with the business, each of which will be credited each year with one seventh part of the profits until Herring dies or retires from the business, or until the amount so credited to his account equals one seventh of the appraised value of the business. Upon the happening of either of those contingencies and the conveyance to him of one seventh part or interest in the business or the drawing out by him or by his estate of the amount of profits credited to his account, the trust will terminate. In the meantime, if the shares of the income to be credited as aforesaid are not needed in the business, they must be invested in accordance with the direction of the testator, in some safe and secure manner, for the benefit of parties interested.

Decree accordingly.

- F. S. Hall, for Annie M. Hale and Edwin E. Hale.
- H. E. Ruggles, (J. B. Crawford with him,) for H. Mortimer Herring.
- F. H. Williams, for Fred H. Williams, trustee, and Raymond V. Draper.

GEORGE E. A. O'BRIEN vs. ROBERT J. GOVE & others.

Suffolk. January 28, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Equity Pleading and Practice, Master's report.

In a suit in equity, where the case has been referred to a master under an order in the usual form and the master has filed a report in which he finds that the allegations of the bill relied upon by the plaintiff as the ground for relief are not true and does not report the evidence, and no exceptions are taken to the master's report, the only action possible for the judge who hears the case is to make a decree that the bill be dismissed.

RUGG, J. This is a suit in equity by which the plaintiff seeks to set aside the foreclosure of a mortgage on real estate, of which he owned the equity, on the ground that the foreclosure sale was not held as advertised. The case was referred to a master under an order in the usual form. No exceptions were taken to the master's report. The master found as a fact that the foreclosure sale was held as advertised and stated that this was the only issue tried before him. As the evidence is not reported, there is nothing upon which to base a criticism of this finding. It stands as final. A decree * has been entered dismissing the bill, from which the plaintiff appealed. The only matter open for argument is that the decree could not have been entered lawfully upon the facts found. It is too plain for discussion that the only action possible, upon a finding that the allegations upon which the plaintiff relied were not true, was to dismiss the bill.

Decree affirmed with costs.

The case was submitted on briefs.

F. A. Torrey & E. W. Woodside, for the plaintiff.

A. C. Berman, for the defendants.

^{*} Made in the Superior Court by Richardson, J.

FRANCIS C. WELCH & others, executors & trustees, vs. CITY OF BOSTON & others.

Suffolk. January 24, 1911. - March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Equity Jurisdiction, Interpleader, Multiplicity of interests, Taxes illegally assessed, Submission to jurisdiction. Tax, Assessment. Municipal Corporations.

Even if exclusive remedies had not been given by statute for contesting the amount and determining the validity of taxes, a bill of interpleader would not lie to determine whether personal property belonging to the estate of a testator was assessable for taxation in the hands of the executors of his will in the city of his domicil or whether it had passed to the trustees under the will and was assessable in another city and two towns, where different beneficiaries lived and where a tax upon their respective interests in the property had been assessed.

Even if exclusive remedies had not been given by statute for contesting the amount and determining the validity of taxes, it is at least very doubtful whether a bill in equity could be maintained under R. L. c. 159, § 3, cl. 3, on the ground of multiplicity of interests which cannot be justly and definitely decided and adjusted in one action at law, to determine whether personal property belonging to the estate of a testator was assessable for taxation in the hands of the executors of his will in the city of his domicil, or whether it had passed to the trustees under the will and was assessable in another city and two towns, where different beneficiaries lived.

In this Commonwealth, where the remedies given by statute for contesting the amount and determining the validity of taxes are exclusive, equity will not interfere to determine the validity of a tax.

The assessors of a city or town have no authority to consent in behalf of the city or town to proceedings in a court of equity to determine the validity of a tax. Nor has the collector of taxes of a city or town such authority.

Even if the inhabitants of a town or the city council of a city should attempt by a vote in regular form to consent to proceedings in a court of equity to determine the validity of a tax assessed by the assessors of the town or city, it seems that such action could have no effect, because there can be no waiver in behalf of the public except by legislative authority. Expression of opinion in Forest River Lead Co. v. Salem, 165 Mass. 193, 202, explained.

Knowlton, C. J. The plaintiffs, as executors of the will of Quincy A. Shaw, have been taxed by the assessors of the city of Boston for a large amount of personal property belonging to his estate. They contend that, before the time for the assessment of this tax, the property had passed to themselves as trustees, and was therefore not taxable in Boston. If they are right in

this contention, they have a perfect remedy by paying the tax and suing the city and collecting it back. It appears that, as trustees under this will, they have also been taxed for portions of this property in the city of Beverly and the towns of Brookline and Milton, where different beneficiaries under the trust reside, and where it is taxable, if it was legally transferred from the executors to the trustees, and notices thereof given to the assessors, in accordance with the requirements of the law. The plaintiffs have brought a bill * which is referred to as a bill of interpleader, and have made these four municipalities, and the assessors and tax collector of each of them, parties, seeking to compel them to come in and interplead, and thus to try the validity of the several assessments made upon the property. The first question is whether the court has jurisdiction of the case.

This is not strictly a bill of interpleader, and, apart from considerations relative to the statutes providing for the assessment and collection of taxes, to which we shall refer hereafter, it is plain that it cannot be maintained as such. It is not a case to settle the right to certain property which is brought into court. The claim of each of the defendants is entirely independent of that of each of the others. There is no privity between them, or between either of them and the plaintiffs. It is not a case in which the plaintiffs are free from interest in the controversy; for the rate of taxation differs greatly in the different places, and it is for the interest of the plaintiffs, or of those whom they represent, that some of the defendants should prevail rather than that some others of them should prevail. No property is brought into court to be contended for by the different defendants. The plaintiffs ask the court to determine the truth as to certain facts which are in dispute between the parties, and upon the existence of which the legal rights of some of the parties, in the performance of their official duties, depended when they assumed to perform these duties. The suit cannot be maintained as a bill of interpleader. Third National Bank of Boston v. Skillings Lumber Co. 132 Mass. 410. Fairbanks v. Belknap, 135



^{*} Filed in the Supreme Judicial Court on December 9, 1910. The case came on to be heard before *Braley*, J., who, at the request of the parties, reserved it for determination by the full court.

Mass. 179, 184. Salisbury Mills v. Townsend, 109 Mass. 115. Northwestern Mutual Life Ins. Co. v. Kidder, 162 Ind. 882. Maxwell v. Frazier, 52 Ore. 188.

It is at least very doubtful whether, apart from considerations to which we have already referred, the bill could be maintained as a bill in the nature of a bill of interpleader, under the R. L. c. 159, § 8, cl. 3. See cases above cited.

But these considerations arising from the laws in regard to the raising of money by taxation are conclusive. We have an elaborate statutory system covering this subject, the purpose of which is to assure a prompt collection of revenue for the government, in its different departments and subdivisions. Remedies are provided for those who are compelled to pay taxes illegally assessed, which are direct and adequate. For this reason it has been decided many times, in this Commonwealth, that equity will not interfere to determine the validity of a tax, but will leave the machinery of government to move precisely as it was intended to move by the framers of the laws in regard to the assessment and collection of taxes. Brewer v. Springfield, 97 Mass. 152. Loud v. Charlestown, 99 Mass. 208. Hunnewell v. Charlestown, 106 Mass. 850. Norton v. Boston, 119 Mass. 194, 195. The rule has been reaffirmed recently. Webber Lumber Co. v. Shaw, 189 Mass. 866. Greenhood v. MacDonald, 183 Mass. 842. The doctrine was applied to a case identical with the one at bar, in all its material facts. Macy v. Nantucket, 121 Mass. 351. That this case rightly states the law of this Commonwealth has never been questioned. The cases in New York are under a statutory system which is materially different from that of Massachusetts. It is held there that assessors are liable to a suit for damages for assessing a tax against one upon whom they have no right to make an assessment. Dorn v. Fox, 61 N. Y. 264. Dorn v. Backer, 61 N. Y. 261. Mohawk & Hudson Railroad v. Clute, 4 Paige, 384. Thomson v. Ebbets, Hopk. Ch. 272. On the question before us these decisions are at variance with our own.

The only remaining question is whether we have jurisdiction from the fact that none of the defendants has objected to the jurisdiction. This is a matter affecting the public interest. The considerations which have moved this court to decline to interfere with the collection of a tax assessed by the proper officers



have been considerations of public policy, adopted, and impliedly declared, by the Legislature, in the statutes relative to the taxation of property. The assessors of each of the cities and towns have been brought before the court as defendants in this case. Their duties are prescribed, and when they have assessed the taxes and issued their warrant to the collector they have no power to do anything that shall interfere with the collection of the taxes. They cannot consent to proceedings in a court of equity, to determine the validity of the action that they have taken officially under their oaths. They are a board of public officers who act under the authority of the statutes. It is no part of their duty to represent the people in a suit of this kind.

The same is equally true of the collector of taxes. When his warrant is committed to him by the assessors, he is to do that which the law has prescribed for him, namely, he is to collect the taxes, and all of them, so far as possible. He has no more power than a member of the school committee to waive anything, or to consent to anything that shall put in question the validity of the tax before a court of equity.

It could not be contended that attorneys representing any of these defendants would have such power, by virtue of their ordinary relations to their clients or the courts. There is nothing before us to indicate that either of these municipalities has taken any special action, by vote of the inhabitants of the town, or of the representative government of the city, to suspend the collection of the taxes and submit these questions to a court of equity. We infer from the course of the proceedings that the action or inaction, touching this subject, has been that of certain city or town officers, none of whom has authority to consent to the interruption of the statutory proceedings for the assessment and collection of taxes.

But even if the inhabitants of a town or the city council of a city should attempt to do this, we are of opinion that they would be without authority thus to set aside the statutes. They are not like the proprietors of private property who may do with it what they will. The voters of a town, assembled in town meeting, are only a part of the machinery of the government authorized by the statutes to do certain things. Most of the public

officers created by the Legislature are as independent in their respective spheres as is the town meeting in its sphere. By what authority, under our statutes, can the voters of a town undertake to undo the work of the assessors, as public officers, by submitting a tax which they have assessed to the consideration of a court of equity to determine its validity? The statutes have prescribed the method for determining this, namely, by proceeding to collect the tax, and trying the question upon an action to recover it back. The Legislature has left the voters of the town with no jurisdiction or authority in this respect. The public are interested in the collection of the tax, that the money may be expended for public uses, in accordance with the appropriations. The town meeting is given no jurisdiction to interfere with the rights of the public in this particular.

The same considerations apply to such an attempt to interfere with the performance of the duties of the tax collector, who is an independent officer. The statute tells him to collect the tax. The town meeting has no right to tell him not to collect it.

Moreover, his collection of the tax is not merely to meet the necessary expenditures of the town and its appropriations, but a State and a county tax are included in each annual assessment. If it were possible for a city or town to waive the collection of so much of the tax as was ordered for the public uses in its charge, it could not waive the collection of the State or county tax, and interrupt the collector in the performance of his duty, until he should await the result of litigation in equity.

In Forest River Lead Co. v. Salem, 165 Mass. 193, where there had been a very long and expensive hearing before a master, and the question of jurisdiction was not raised until the case was under consideration by this court, all parties wished to have the merits decided, and we "expressed our opinion" and made a decree without hearing argument upon the question of jurisdiction, and without a careful consideration of the question. The court assumed that "reasons of policy in favor of the prompt collection of taxes... may be waived by the parties interested." This is true. But the parties interested are the whole public. The Legislature represented the public in the enactment of our laws on this subject. The Legislature has not given to any board of public officers or to any city or town the right to rep-

resent the public in this particular. There can be no waiver in the interest of the public, except by legislative authority.

Bill dismissed.

- T. M. Babson, for the city of Boston.
- F. Rackemann, for the town of Milton and others.
- W. H. White, for the town of Brookline.
- G. W. Anderson, (A. E. Lunt with him,) for the city of Beverly.

HENRY C. LITTLE vs. JOSEPH B. PHIPPS & others.

Suffolk. January 25, 1911. - March 3, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

- Agency. Custom. Equity Jurisdiction, Accounting. Evidence, Presumptions and burden of proof. Equity Pleading and Practice, Master's report.
- If an agent in charge of property belonging to his principal takes a secret profit or commission in regard to the matter in which he is employed, he loses his right to his agreed compensation, although the result may be to give the principal the benefit of valuable services rendered by the agent without compensation.
- If an agent in charge of property belonging to his principal takes a secret commission, by which he loses his right to compensation for his services, he cannot avoid this result by showing that it was the custom for agents to take such commissions without the knowledge of their principals, because such a custom would be contrary to sound public policy.
- In a suit in equity for an accounting, brought by the owner of certain real estate against his agent, in whose hands the property had been placed for management and sale at a profit, with an agreement that on the sale of the property by the defendant as agent, after paying the incidental expenses, the plaintiff should be paid the money advanced by him for the purchase of the property with interest at the rate of six per cent and that the net balance should be divided equally between the plaintiff and the defendant, it appeared that the defendant sold the property at a profit, but that in rendering an account to the plaintiff of incidental expenses he charged \$50 as paid to an attorney for examining the title, when in fact he had paid the attorney only \$25. Held, that this secret discount, whether taken with a corrupt intent or not, was a failure of duty on the part of the defendant which deprived him of his right to retain his stipulated portion of the net proceeds of the sale or to receive any compensation for his services.
- In a suit in equity for an accounting, brought by the owner of certain real estate, which he had put in the hands of the defendant for management and sale, where the plaintiff contends that an item of a certain amount, which was charged in the defendant's account as paid to the plaintiff, was so charged improperly and that the defendant should not be credited with it, the burden is not on the plaintiff to prove that the amount was credited to the defendant improperly, but

is on the defendant to account for the money or property of the plaintiff that had come into his hands.

In a suit in equity a finding of a master on a question of fact cannot be revised unless the evidence on which the finding was made is reported or described in his report.

MORTON, J. This is a bill for an accounting in respect to various transactions between the plaintiff and the defendant Phipps, whom we will speak of as the defendant. The case was sent to a master.* Upon the coming in of his report both parties filed objections and exceptions thereto. Certain of the plaintiff's exceptions were sustained and the others were overruled. The defendant's exceptions were overruled. A decree was entered in favor of the plaintiff.† Both parties appealed from the order overruling their exceptions and from the final decree.

The matters now in issue relate to only two transactions the Allen estate so called and the St. James Terrace property the others having been eliminated. The plaintiff was induced to purchase these estates by the recommendation of the defendant with a view to their resale. The plaintiff was to furnish and did furnish the funds to make the purchases, and the title to both estates was taken in his name. In regard to the Allen estate it was agreed that the defendant should manage the property and should sell it, and that from the proceeds, after deducting the expenses incidental thereto, the plaintiff should be repaid the money advanced by him, with six per cent interest, and the net proceeds should be equally divided between the plaintiff and the defendant, the same to be in full for the defendant's services. The property was sold at a profit, but in rendering an account to the plaintiff the defendant charged \$50 as paid to an attorney for examining the title. In fact he paid only \$25; and the plaintiff contends that the result of the defendant's action is to deprive him of any right to compensation.

In regard to the St. James Terrace property, the master finds that the agreement was that the defendant should attempt to sell it, and until a sale should manage it, attend to the necessary repairs and collect the rents, and for his services in managing the estate should receive one half the net profits and should pay



^{*} Arthur P. Hardy, Esquire.

[†] The case was heard in the Superior Court by Hitchcock, J.

to the plaintiff the other half. In ascertaining the net profits six per cent interest was to be allowed the plaintiff on the amount paid by him on account of the purchase, and if a sale was made the parties were to divide equally the net balance of the selling price after deducting the amount advanced by the plaintiff on account of the purchase. The property was purchased in May, 1904, and the defendant continued to manage it until January 1, 1906, when the plaintiff took charge of it in accordance with a notice which he gave to the defendant and to which, so far as appears, the defendant did not object. During the time that the defendant managed the property he received a secret rebate or commission of ten per cent on all bills for repairs. The plaintiff contends that, by reason thereof, the defendant has lost any right to compensation which he would otherwise have had as in the similar case of the Allen estate. The master ruled that the defendant should account for the ten per cent thus received, but refused to disallow his claim to one half the net profits received by him during his management of the property, and the judge of the Superior Court sustained the ruling subject to the plaintiff's objection and exception. In regard to the charge for the attorney's fee in the Allen case the master refused to rule as requested by the plaintiff that it constituted a fraud on him and deprived the defendant of all right to share in the net profits arising from the sale of the estate, and found and ruled that the plaintiff had failed to prove any fraud on the part of the defendant in connection with the management or sale of the estate. He found that it did not appear under what circumstances the discount was made, and declined to make any deduction on account of it. The judge, however, allowed the defendant only what he actually had paid.

It is well settled that the agent is bound to exercise the utmost good faith in his dealings with his principal. As Lord Cairns said, this rule "is not a technical or arbitrary rule. It is a rule founded on the highest and truest principles of morality." Parker v. McKenna, L. R. 10 Ch. 96, 118. See also Quinn v. Burton, 195 Mass. 277; Wadsworth v. Adams, 138 U. S. 380; Murray v. Beard, 102 N. Y. 505. If the agent does not conduct himself with entire fidelity towards his principal, but is guilty of taking a secret profit or commission in regard to

the matter in which he is employed, he loses his right to compensation on the ground that he has taken a position wholly inconsistent with that of agent for his employer, and which gives his employer, upon discovering it, the right to treat him so far as compensation, at least, is concerned, as if no agency had existed. This may operate to give to the principal the benefit of valuable services rendered by the agent, but the agent has only himself to blame for that result. If the plaintiff had known that the defendant was receiving commissions and had not objected, the case would have stood very differently. But the master has found that the plaintiff was ignorant of it. The fact that it was the custom to do as the defendant did cannot help him. Such a custom is contrary to sound public policy. It was held in Hippisley v. Knee Brothers, [1905] 1 K. B. 1, that inasmuch as the defendants had received the secret discount without fraud and in respect to a matter that was merely incidental to and separate from the main duty which they owed to the plaintiff, they were not thereby disentitled to retain their commission. It is difficult to see why the secret discount did not relate to the very things which the defendants were employed to do, as was held to be the fact in the later case of Stubbs v. Slater, [1910] 1 Ch. 195. But however that may be it is impossible to say, we think, in the present case, what part of the compensation agreed upon was due in respect to the unfaithful part of the defendant's services and what was not, and it follows that he is entitled to retain no part of the compensation agreed upon, even according to the doctrine laid down in Hippisley v. Knee Brothers, supra. It is immaterial whether the secret discount was taken with a corrupt intent or not. is the inconsistent relation created by taking it, and its corrupting tendency which the law condemns. Harrington v. Victoria Graving Dock Co. 3 Q. B. D. 549. It should be observed that it is now made criminal for an agent to receive a commission under circumstances like those appearing in this case. St. 1904, c. 843. The result is that we do not think that the defendant is entitled to retain any of the stipulated profits or compensation which he has received.

The plaintiff contended that an item of \$225, which was charged in the defendant's account as paid to the plaintiff, was



improperly so charged, and that the defendant should not be credited with it. The master ruled that the burden was on the plaintiff to show that it was improperly credited to the defendant, and found that he had failed to sustain the burden and for that reason disallowed the plaintiff's contention. The plaintiff objected and excepted to this ruling and finding. The exception was overruled. The burden of proof was on the defendant to account for money or property of the plaintiff that had come into his hands, and for that reason this exception should have been sustained. *Marvin* v. *Brooks*, 94 N. Y. 71.

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The defendant contends that the master should have allowed him one half of the profits of the management of the St. James Terrace property since the plaintiff took possession of it in Jan-The master's findings and rulings in regard to this matter are as follows: "I find and rule that the substance and effect of the agreement between the parties, was that the respondent was to receive one half of the net profits from the running of the estate as compensation for his services in that connection, and that when the estate was sold he was to receive one half of the net profits of the sale in addition to whatever he had received from the management. I also find and rule that when he ceased to have charge of the property his right to one half of the profits of the management of the estate ceased, and that he is not entitled to an accounting from the complainant for profits made in the running and management of the estate subsequent to January 1, 1906."

The evidence is not before us and we cannot therefore say that these rulings and findings are wrong. So far as appears there was nothing to prevent the plaintiff from taking possession of the property as he did, and nothing to require him to account to the defendant for any part of the profits after he took possession.

The result is that the decree must be set aside and the case stand for further hearing in accordance with this opinion.

So ordered.

- S. R. Wrightington, for the plaintiff.
- G. V. Phipps, F. Durgin & R. A. B. Cook, for the defendant Phipps, submitted a brief.

LUCIUS B. FOLSOM & another vs. GEORGE F. LEWIS & others.

Suffolk. January 25, 1911. — March 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Equity Jurisdiction, To enjoin unlawful strike, Unlawful interference with contract. Strike. Labor Union.

A strike by workmen engaged in a certain trade, to compel their employers to submit to an attempt to obtain for a labor union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wish to work at the trade to join the union and by forcing the employers to agree not to employ workmen unless they are members of the union or have agreed to become members, is not for a lawful purpose, and a suit in equity may be maintained to enjoin it.

Conduct of workmen which directly affects an employer to his detriment by interference with his business is not justifiable in law unless it is of a kind and for a purpose that tend to procure benefits that the workmen are trying to obtain.

The purpose of adding to the power of a labor union, in order to put it in a better condition to enforce its demands in controversies with employers that may arise in the future, does not justify an attack on the business of an employer by inducing his workmen to strike.

A suit in equity may be maintained to enjoin the defendants from unlawfully interfering with the plaintiff's business by inducing persons under contract with the plaintiff for future service to break their contracts.

KNOWLTON, C. J. This is one of ten bills in equity, brought by different parties and heard together before a master,* to obtain an injunction to restrain the defendants from calling or declaring any strike and from proceeding with any strike already called to "unionize" the plaintiff's shop, from inducing or persuading persons under contracts of employment to break them, from conspiring or combining to prevent any person, by threats, picketing or intimidation from entering or continuing in the employ of the plaintiffs, and to recover damages. Exceptions were taken by both parties to the report of the master, and, after a hearing, the plaintiff's exceptions were sustained and the defendant's exceptions overruled. A decree for the plaintiffs was entered,† and the defendants appealed.

^{*} Elbridge R. Anderson, Esquire.

[†] The final decree was ordered by *Hardy*, J. A previous interlocutory decree was made by *Richardson*, J.

There was a strike by the Boston Photo-Engravers Union against all the non-union employers of photo-engravers in Boston. The master found "that one of the objects of the strike was to compel the employers to recognize the union and to enter into an agreement with the union as such to employ none but union men, or non-union men provided they should join the union within thirty days and have a certificate of the right to work until the time that they had joined the union, and that the strike was a strike for the closed shop." He therefore found and ruled that the strike was not for a lawful object in these particulars.

The principal contention before us is that this finding is plainly wrong. The evidence upon this part of the case is not before us, except as the master has reported a large number of evidential facts, most if not all of which appear to be unquestioned, upon which his conclusion is founded. The only evidence that he was asked to report was that on the claim for damages.

The matters stated in the report amply justify, if they do not require, the finding that was made by the master. The general course of proceedings of the local union and its officers, and the International Photo-Engravers Union with which the local union was connected, and the officers of the International Union, some of whom were in Boston several months before the strike was called, seemingly engaged in the work of trying to obtain control of the labor in all the shops in Boston and to compel the assent by the employers to an agreement which should establish the closed shop in this business in Boston, all tend to support this finding of the master. While certain concessions were asked for in the interest of the men, just before the strike was ordered, most if not all of which the employers seem to have been willing to grant, the part of the proposed agreement which the representatives of the union absolutely insisted upon was article eight, "That the employing photo engravers signing this agreement shall employ none but members of the International Photo Engravers Union of N. A., or applicants for positions holding permit from the Boston Photo Engravers Union. No. 8 I. P. E. U." There is nothing in the case to indicate that there was anything in the condition of the business, or in the relations of the workmen to their employers, that made such **VOL. 208.** 22

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a requirement of any importance to these employees, in reference to their profit or comfort, or other direct interest as employees. The master was undoubtedly right in finding that the purpose of the defendants and the real object of the strike were not so much to obtain certain slight advantages referred to in the proposed agreement, as to compel the employers, by inflicting this injury upon them, to submit to an attempt to obtain for the union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wished to work to join the union, and by forcing all employers to agree not to employ laborers, except upon such terms as they could make with the combination that should control all labor in this business. This has been held to go beyond the limit of justifiable competition. Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union, to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to Berry v. Donovan, 188 Mass. 353. Plant v. Woods, 176 Mass. 492. Pickett v. Walsh, 192 Mass. 572. This most important part of the decision of the master and of the judge is well sustained.

There was also a finding that the defendants interfered with persons who were under contracts with the plaintiffs for future service, by inducing them to break their contracts. This too was a special wrong which was a proper subject for an injunction.

There was evidence well warranting the finding of the master on the question of damages.

Decree affirmed with costs.

D. V. McIsaac, (H. F. Callahan with him,) for the defendants. W. M. Noble, for the plaintiffs.

JAMES CONDON vs. JOSEPH A. GAHM & another.

Suffolk. January 26, 1911. — March 8, 1911.

Present: Knowlton, C.J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, Employer's liability.

In an action by a teamster against his employer for personal injuries sustained by reason of a fall caused by the breaking of a strap which the plaintiff was tightening around some barrels on the tail board of his wagon, it appeared that the plaintiff had been in the employ of the defendant for about three weeks, that the strap was in two pieces, one attached on each side of the wagon, and commonly hung under the wagon buckled together in the middle, that the plaintiff had not used this strap until the time of the accident, when it broke as he first attempted to tighten it, that the defendant had no stock of straps on hand but purchased a new one whenever needed, and that he employed no inspector of wagons and harnesses. A part of the strap was in evidence and seemed from its appearance to have been subjected to somewhat prolonged and severe use. The defendant testified that he depended upon his driver to look after the wagon and all its attachments and to report any defects, but he did not say that he had notified the plaintiff of this, and it did not appear that the plaintiff understood that inspection of the appliance was a part of his work. Held, that it could not have been ruled as matter of law that the plaintiff assumed the obligation of inspection as a part of his service, and that the questions whether the plaintiff assumed the risk of such an accident and whether the defendant was negligent in failing to furnish safe appliances or to call the plaintiff's attention to their condition, were for the jury.

TORT for injuries received by the plaintiff on April 18, 1907, while in the employ of the defendants as a teamster, by reason of a fall caused by the breaking of a strap attached to the plaintiff's wagon which he was tightening around two or three barrels on the tail board. Writ dated May 9, 1907.

In the Superior Court the case was tried before *Brown*, J., who at the close of the plaintiff's evidence ruled that there was no case to go to the jury, and ordered a verdict for the defendants. By agreement of the parties the judge reported the case for determination by this court, with the stipulation, that, if his ruling was correct, judgment was to be entered for the defendants, and that, if his ruling was wrong, judgment was to be entered for the plaintiff in the sum of \$500.

- A. T. Smith, for the plaintiff, was not called upon.
- W. H. Hitchcock, (C. M. Pratt with him,) for the defendants.

RUGG, J. The plaintiff was in the employ of the defendants for about three weeks as a driver of a single horse and heavy express wagon. A strap, adapted for securing a load, was attached permanently at both ends to the wagon. It was in two pieces, buckled together, and commonly hung under the body of the wagon. It was furnished as a part of the equipment with which the plaintiff was to work. The plaintiff had not used this strap until the day of the accident, when it broke as he was tightening it around some barrels, and he was injured. The defendants had no stock of straps on hand, but purchased a new one whenever needed. They employed no inspector of harnesses and wagons. One of the defendants testified that he looked them over as he saw them on the street or at the stable, and caused them to be overhauled once a year. One part of the broken strap, which had been put in evidence at the trial, was exhibited at the argument.

There is nothing in these facts to warrant a recovery on either of the counts in the declaration based upon the employers' liability act. But the plaintiff should have been permitted to go to the jury upon his counts at common law alleging defective appliances.

The plaintiff assumed all the obvious risks of his employment, including those which he in fact discovered and those which might have been disclosed by a reasonably thorough investigation, but not those which were obscure or hidden. Crimmins v. Booth, 202 Mass. 17, and cases cited. The strength of a leather strap depends in a material degree, according to common knowledge, upon the length of time it has been used, the nature and extent of its service and the care given to it. These were matters within the knowledge of the employer, and would not have been seen by ordinary examination. This strap seems, from its appearance, to have been subjected to somewhat prolonged and severe use, and it was exposed to the weather and the deteriorating consequences of being under a wagon constantly upon the streets. One of the defendants testified that he depended upon his driver to look after the wagon and all its attachments, and to report any defects, but he did not say that he so notified the plaintiff, and it does not appear that the plaintiff understood this to be a part of his work. If the duty of inspection was definitely placed upon the plaintiff by his contract of employment, then he could not recover for any injury resulting from his failure in this regard. But it could not have been ruled, as matter of law, that the plaintiff assumed this obligation as a part of his service. The breaking of the strap might have been found to indicate its weakness at the time of the plaintiff's employment, which he could not be held to have discovered by the reasonably prudent examination required of him before entering upon the employment. Hence, the questions of the due care of the plaintiff and his assumption of risk and of the negligence of the defendants in failing to furnish safe appliances or to call the plaintiff's attention to their condition were for the jury. Lundergan v. Graustein & Co. 203 Mass. 582. Murphy v. O'Neil, 204 Mass. 42. Haley v. Lombard, 207 Mass. 545.

In compliance with the terms of the report let judgment be entered for the plaintiff in the sum of \$500.

So ordered.

CHARLES MANN vs. MOORE SPINNING COMPANY.

Middlesex. December 8, 1910. — March 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence, Employer's liability.

One, who is employed in a well lighted spinning mill and knows that, in dipping liquid soap from a tank into a trough where combed wool is washed, a fellow employee sometimes drops some of the soap upon the floor, and who in the course of his duties walks upon that part of the floor and is injured by slipping upon some soap which the fellow employee had dropped there and should have cleaned up, cannot recover from his employer although he did not know and had not been told what was the effect as to slipperiness of liquid soap upon the floor, the risk being an obvious one which he had assumed, and the accident being due to the carelessness of a fellow servant.

TORT for personal injuries caused by the plaintiff slipping upon some scap on the floor of the defendant's spinning factory where he was employed. Writ dated August 6, 1908.

In the Superior Court the case was tried before Hardy, J.

It appeared from the plaintiff's testimony that he had been working in the defendant's factory for about two months at

the time of the accident "running the French gill boxes," and that the room where he worked was light; that along one side of the room and about thirty feet from the plaintiff was a "backwasher," which was a series of troughs filled, some with soap and others with soap and water, through which wool was passed by means of rollers; that there were big windows on the side of the room by the backwasher; that one Stanley ran the backwasher and one Robinson was in charge of the room for the defendant; that from time to time, as the plaintiff knew, when Stanley needed soap Robinson would designate some one to go to another room to get it; that the plaintiff never had been assigned to or performed that duty before the accident; that the plaintiff had seen Stanley dip the soap, which was in a liquid or semi-liquid form, with a dipper from a tank three feet from the backwasher and carry it across the floor to the backwasher, and the day before the accident he had seen soap drip upon the floor from the dipper.

On the day of the accident, which was a bright day in June, after the plaintiff had poured the soap into a box from the nearby room, he and Stanley were attempting to carry the box to the tank near the backwasher when the plaintiff slipped upon some soap on the floor and fell. It was Stanley's duty to keep the floor clean and free from soap.

There also was evidence that the plaintiff, because of a trouble with his eyes, was wearing dark glasses at the time of the accident, that he did not realize that the floor where he slipped was slippery, and that he did not know and never had been told what was the effect as to slipperiness of liquid soap on the floor.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Bent, for the plaintiff.

F. E. Dunbar, (J. J. Rogers with him,) for the defendant.

LORING, J. It is settled by previous decisions that there was no aspect of the evidence put in by the plaintiff which entitled him to go to the jury. Murphy v. American Rubber Co. 159 Mass. 266. Kleinest v. Kunhardt, 160 Mass. 280. Feely v. Pearson Cordage Co. 161 Mass. 426. Thompson v. Norman

Paper Co. 169 Mass. 416. Dene v. Arnold Print Worke, 181 Mass. 560. McRea v. Hood Rubber Co. 187 Mass. 326. McTiernan v. American Woolen Co. 197 Mass. 288. Goudie v. Foster, 202 Mass. 226.

Exceptions overruled.

HENRY C. DAVIS, executor, vs. TREASURER AND RECEIVER GENERAL.

Middlesex. December 9, 1910. — March 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Taz, On inheritances and successions. Statute, Construction.

The limitation of the exemption from the imposition of a succession tax upon bequests to "a city or town for public purposes" to bequests for such purposes to "a city or town within this Commonwealth," which existed before the enactment of St. 1909, c. 527, § 1, was not changed by that statute, which is merely declaratory of the previous statutes on the subject.

LOBING, J. By her last will Mary E. Elliott gave to the town of Hopkinton in the State of New Hampshire the residue of her property as a perpetual fund to be invested by a board of three trustees (thereinafter named), the income to be expended under their direction and at their discretion "in conjunction with the almoners of the town, in aid of the worthy poor of American parentage, residents of the town of Hopkinton." The testatrix died on November 23, 1908, leaving personal property within this Commonwealth which passed under this residuary clause, and the question to be decided is whether it is subject to an inheritance tax under our statutes.

If the testatrix had died seven months later the question would have been answered by St. 1909, c. 527, § 1, which took effect on its passage June 19, 1909. That section provides (1) that the exemption of gifts to "charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation," shall be to such societies or institutions "the property of which is by the laws of this Commonwealth exempt from taxation"; (2) that the exemption of gifts to charitable purposes shall be an exemption of gifts to "charities to be

carried out within this Commonwealth"; and (3) that the exemption of bequests to "a city or town for public purposes" shall be an exemption to "a city or town within this Commonwealth for public purposes."

The question which we have to decide is whether this statute (St. 1909, c. 527, § 1) is declaratory of the previous statutes or whether it made a change in them.

We are of opinion that it was declaratory and that it did not make a change in the previous statutes.

The only one of these three exemptions found in the original acts, St. 1891, c. 425 (which was limited to duties upon collateral inheritances), was an exemption of gifts "to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation." It was held in the first case which arose under that act (Minot v. Winthrop, 162 Mass. 113) that this exemption did not apply to a bequest to a church in New York. It was there said (at p. 126) that this exemption "is confined to societies the property of which is exempt from taxation by the laws of this Commonwealth." To the same effect see Balch v. Shaw, 174 Mass. 144; Rice v. Bradford, 180 Mass. 545; Pierce v. Stevens, 205 Mass. 219.

The exemption of "bequests to towns for any public purpose" was added by St. 1895, c. 807.

It was decided in *Hooper* v. Shaw, 176 Mass. 190, that a gift for charitable uses was not exempt. This was changed by St. 1906, c. 436. The new exemption in terms was limited to gifts "to a trustee or trustees for public charitable purposes within the Commonwealth."

Apart from any change which may have been made by the wording used in the re-enactment of the original acts, there can be no question as to the extent of these exemptions. Before the re-enactment of any of the original acts the exemption of gifts to "charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation" had been held by the court to be confined to such societies or institutions the property of which was exempt from taxation by the laws of this Commonwealth. The act which created the exemption of gifts for charitable uses had in terms confined it to gifts "to a trustee or trustees for public charitable purposes within

the Commonwealth." The only exemption which had not been thus limited by the court or by the Legislature was that of "bequests to a city or town for any public purpose," added by St. 1895, c. 807. When this act of 1895, c. 807, was passed, the decision in Minot v. Winthrop was a recent one (having been made late in the previous year), and it is fair to presume that the Legislature had that in mind in not expressly limiting the new exemption to a city or town within this Commonwealth. there is an additional reason why it should have been thought not to be necessary to state in terms that the exemption of a gift to a city or town for public purposes was confined to a city or town within the Commonwealth. That reason is to be found in the fact that the ground for exemption of property from taxation is the benefit that accrues to the public from the use of that which is exempted. See Opinion of the Justices, 195 Mass. 607, 609; In re Prime, 186 N. Y. 847, 862; Carter v. Whitcomb, 74 N. H. 482. The contention that originally it was intended by St. 1895, c. 807, to exempt gifts to cities or towns outside the Commonwealth would have been a hopeless one.

As we have said it is plain that all three exemptions as they severally arose were restricted to the Commonwealth. The only basis for the argument made here by the petitioner lies in the fact that these exemptions have not in terms been so limited in the several re-enactments of the original acts.

When the Revised Laws were enacted the exemption of charitable uses did not exist. The other two exemptions were reenacted in the words of the original statutes. The exemption made in St. 1891, c. 425, of gifts to charitable, educational and religious societies had been construed by the court and the reenactment of that exemption in the wording of the original act carried with it the construction which had been given to it by the court.

The next re-enactment was in the direct inheritance tax act, St. 1907, c. 563, § 1. At this time the third exemption (of charitable uses, St. 1906, c. 486) had been made. In the direct inheritance tax act the wording of the Revised Laws was followed not only as to the two exemptions there provided for but also as to the new exemption of charitable uses (made by St. 1906, c. 486). In this way the express limitation put into St. 1906,

c. 436 (as to charitable uses) dropped out. The fact that these words of express limitation of that exemption dropped out cannot be taken to signify that a change of construction was intended. The same is true of the act to codify and amend the - laws relating to taxation (St. 1909, c. 490). Here again the original phraseology was followed. See Part IV. § 1. But by the subsequent act of the Legislature which we already have referred to (St. 1909, c. 527, § 1), it was expressly enacted that all three exemptions should be confined to this Commonwealth. The curious part of St. 1909, c. 527, which we now hold to be a declaratory act, is that although it is an act subsequent to the codifying act (St. 1909, c. 490,) it amends not the codifying act but one of the earlier acts re-enacted in the codifying act. The explanation is that the later act went into effect on its passage, June 19, 1909, while the codifying act (which was passed on June 12) did not. The matter is further expressly dealt with in St. 1909, c. 490, Part IV. § 27.

The result is that the decree of the Probate Court must be affirmed.

So ordered.

The case was submitted on briefs.

J. A. Halloran, for the appellant.

D. Malone, Attorney General, & F. T. Field, Assistant Attorney General, for the appellee.

DOMENICO VOZZELLA vs. EDWARD P. OSGOOD & another.

Suffolk. January 10, 11, 1911. — March 4, 1911.

Present: Knowlton, C. J., Lobing, Braley, Sheldon, & Rugg, JJ.

Negligence, Employer's liability.

At the trial of an action for personal injuries received while the plaintiff was working in the defendant's foundry, there was evidence tending to show that, under the immediate supervision of a superintendent of the defendant, the plaintiff and two other men were engaged in rolling from a sand mould an iron wheel weighing fifteen hundred pounds which still was hot, they being supplied with

cloths for handling it, when the superintendent called away one of the three who was walking backward holding the wheel in front of him, that the plaintiff and his remaining fellow workman continued to roll the wheel, but that the two "couldn't keep hold of the wheel and it fell" crushing the plaintiff's foot. Held, that there was evidence warranting a finding that the plaintiff was in the exercise of due care and that the superintendent was negligent in leaving an insufficient number of men to roll the wheel while it was hot.

LORING, J. The defendant was the proprietor of an iron foundry in which the plaintiff was employed. The jury were warranted in finding the following facts. On the morning in question the plaintiff, with two other employees, was engaged under the immediate supervision of the defendant's superintendent in rolling a wheel from the sand mould in which it was cast the day before. The wheel weighed fifteen hundred pounds, its edges were rough and it was still hot. The men were provided with rags to enable them to hold the wheel. After the wheel had been rolled by the three employees for some "two or three rounds," the superintendent called off the third man, who had been walking backward holding the wheel in front of him, leaving the plaintiff and the other man in charge of the wheel, one on each side of it. One of the witnesses testified that what the superintendent said at this time was: "Two men take the wheel out and one of you men come here and do something There was a conflict in the evidence on this point. Some of the witnesses testified that the superintendent told the two to hold the wheel while the third man should clean the pathway and open a door for the wheel to go through. The plaintiff and the other employee continued rolling the wheel, but (in the words of one of his witnesses) they "couldn't keep hold of it and it fell," crushing the plaintiff's foot.

The defendant has contended that the plaintiff was not in the exercise of due care. But that contention is based solely on the ground that the plaintiff disobeyed the superintendent's order to "hold the wheel." As we have seen, the evidence on that point was in conflict, and this contention fails.

We are of opinion that, having in mind the weight of the wheel, the fact that it was hot, and the further fact that the superintendent originally put three men on the job, the jury were warranted in finding that two men were too few to roll it while it was hot, and that it was negligence on his part to tell

the two to continue to roll it after he had called the third man away if the jury found that to be the fact. See *Di Bari* v. *J. W. Bishop Co.* 199 Mass. 254.

By the terms of the report * the entry must be

Judgment for the plaintiff in the sum of \$400 and costs.

F. Hunt, for the plaintiff.

W. H. Hitchcock (C. M. Pratt with him.) for the defendants.

FRANCES I. BORDEN v. CITY OF BROCKTON.

Plymouth. January 11, 1911. — March 4, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Tax, Sidewalk assessment. Sidewalk. Brockton.

The board of aldermen of the city of Brockton, which had accepted the provisions of R. L. c. 49, §§ 42-44, relative to the establishment of grades for and to the construction of sidewalks, "if in their judgment the public convenience so requires," and to the assessment of one half of the cost thereof upon the abutters, adopted the following order which was approved by the mayor: "Ordered, that the superintendent of streets be and he is hereby directed to lay and construct a granolithic sidewalk in front of" certain estates "and report to the board a schedule of the cost thereon." After the construction of the sidewalk, an abutter was assessed for one half the cost of so much as was constructed in front of his premises. Held, that, because of the omission from the order of the board of aldermen of a statement that in their judgment public convenience required the building of the sidewalk, it was not apparent whether the order was made under R. L. c. 49, § 44, or was an order for specific repairs, which the board had power to make under R. L. c. 48, § 65, St. 1881, c. 192, § 1; and therefore that the order could not be made the foundation of an assessment.

CONTRACT for the amount of an assessment for the laying and construction of a granolithic sidewalk, paid under protest. Writ dated September 23, 1908.

In the Superior Court the case was heard by *Harris*, J., without a jury. The following facts were agreed to:



^{*} In the Superior Court, the case was tried before Raymond, J., who at the close of the evidence by agreement of the parties ordered a verdict pro forma for the defendant and reported the case for determination by this court, it being agreed that, if there was evidence to go to the jury, judgment should be entered for the plaintiff in the sum of \$400 and costs; otherwise, judgment should be entered for the defendant.

On June 25, 1906, the defendant's board of aldermen passed the following order, which was approved by the mayor on July 2, 1906: "Ordered, that the superintendent of streets be and he is directed to lay and construct a granolithic sidewalk in front of the estates of W. H. Tobey, Frances I. Borden and the Central Methodist Church and report to the board a schedule of the cost thereon." Acting thereunder the defendant's superintendent of streets constructed a granolithic sidewalk in front of the estate of the plaintiff, and on August 13, 1906, reported to the board of aldermen the cost thereof to be \$309.60. The sidewalk was accepted by the board and an order was adopted by them charging and assessing the plaintiff with one half the cost of the sidewalk, due notice of which was given to the plaintiff and payment demanded. The assessment was duly committed to the collector of taxes for the defendant by the board of aldermen. The collector, on August 14, 1908, advertised the property of the plaintiff to be sold at public auction on September 8, 1908, for the purpose of satisfying the assessment and the costs and charges thereof. On September 8, 1908, the sale was adjourned until September 22, 1908. On September 15, 1908, the plaintiff paid the assessment, amounting to \$155, under protest. action was to recover the amount so paid.

R. L. c. 48, § 65, referred to in the opinion, (which formerly was Gen. Sts. c. 43, § 59,) reads as follows: "The selectmen or road commissioners of a town may lay out or alter town ways for the use of the town and private ways for the use of one or more of the inhabitants thereof; or they may order specific repairs to be made upon such ways."

St. 1881, c. 192, § 1, reads as follows: "The inhabitants of the town of Brockton shall continue to be a body politic and corporate under the name of the City of Brockton, and as such shall have, exercise and enjoy all the rights, immunities, powers and privileges, and shall be subject to all the duties and obligations, now incumbent upon and pertaining to the said town as a municipal corporation."

R. L. c. 49, §§ 42-44, give power to the mayor and boards of aldermen of cities, and to the selectmen or road commissioners of towns, where the city councils of such cities and such towns have accepted the provisions of those sections, to establish, grade



and construct sidewalks "if in their judgment the public convenience so requires," and to assess one half of the cost thereof upon abutters.

At the request of the parties the judge reported the case for determination by this court, it being agreed that, if the assessment by the board of aldermen, in order to be legal, should contain the words that the decree of the board is that "public convenience so requires" the construction of the sidewalk, judgment was to be entered for the plaintiff in the sum of \$156.55 and costs, but, if the assessment did not require such words to be inserted to make it legal, judgment was to be rendered for the defendant.

The case was submitted on briefs.

L. E. Chamberlain & E. H. Fletcher, for the plaintiff.

W. G. Rowe, for the defendant.

LORING, J. It is not stated in the agreed facts that R. L. c. 49, §§ 42-44, or any of the earlier acts therein referred to, had been accepted by the city council of the defendant. But in the plaintiff's argument it is expressly conceded that each of these sections had been so accepted. The mayor and aldermen of the defendant city (having the powers of selectmen of towns, St. 1881, c. 192, § 1) could have ordered the construction of the sidewalk here in question under the power given by R. L. c. 48, § 65, to order specific repairs. If the order had contained a statement that in their judgment public convenience required the building of the sidewalk, it would have been apparent that they were acting under one of the three systems of sidewalk assessments set forth in R. L. c. 49, as to which see Copeland v. Springfield, 166 Mass. 498. But in the absence of those or other words showing that they were acting under an assessment act, it is not apparent whether the order was made under the act as to specific repairs or under an assessment act. Under those circumstances such an order as we have here is not the foundation of an assessment, and it is not necessary to consider whether the order should have contained the statutory words had one of the assessment acts been the only act under which the order could have been made.

Judgment on the finding.

JOSEPH O. PROCTER & others vs. ATLANTIC FISH COMPANIES, Limited.

Suffolk. January 12, 1911. - March 4, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Sale. Custom. Evidence, Of custom, Relevancy and materiality.

Where, at the trial of an action of contract brought by a purchaser of certain mackerel against the seller for damages caused by an alleged failure of the defendant to deliver what the contract of sale called for, it appears from correspondence between the parties that the contract was for the purchase of three hundred and ninety-one barrels of large, medium and small mackerel, three hundred and fifty barrels of which had been seen and partially examined by an agent for the purchaser, the plaintiff may show that the custom in the fish trade "is, when a party purchases a lot of mackerel he is supposed to receive clean fish" and not "rusty" fish.

Where, at the trial of an action of contract by a purchaser of mackerel against the seller for damages caused by an alleged failure of the defendant to deliver what the contract of sale called for, it appears from correspondence between the parties that the contract was for the purchase of three hundred and ninety-one barrels of clean mackerel, three hundred and fifty of which had been seen and partially examined by an agent for the purchaser, the plaintiff may show that the custom in the fish trade is that, when a purchaser finds that fish purchased as clean are "rusty," the purchaser "is entitled to cull out the rusty fish and have an allowance of half price for the rusties."

In the sale of specific goods as goods of a specified description, the description amounts to a warranty that the goods are as described, and the mere fact that the specific goods were open to inspection and were in fact inspected by the purchaser does not deprive him of his right to rely on such a description as a warranty if the difference between the specific goods and the description of them would not have been and was not detected on the inspection.

At the trial of an action of contract by a buyer against the seller of mackerel, where it appears that many of the mackerel, which were purchased as clean, were "rusty" and the defendant contends that before the purchase an agent of the plaintiff made such an examination of the mackerel as to preclude the plaintiff from maintaining the action, testimony of the agent that he would have made a further examination if he had not been told that the mackerel were sold to a third person, is competent as tending to show that he did not make a thorough examination.

At the trial of an action by a buyer against the seller of a large number of barrels of mackerel, where the plaintiff contends and introduces evidence tending to show that the custom of the fish trade is that, "when a party purchases a lot of mackerel he is supposed to receive clean fish," and that the fish delivered to him by the defendant were not clean but "rusty," the presiding judge properly may refuse to rule that "a warranty as to quality or condition of the mackerel cannot be implied into this case by evidence of custom or usage," since the ruling

is not applicable to the case, the custom tending to prove, not that clean mackerel and "rusty" mackerel are in the trade different qualities of the same grade of mackerel, but that they are different grades of mackerel. Dickinson v. Gay, 7 Allen, 29, distinguished and commented on.

A purchaser availing himself of a custom, which became a part of a contract of sale to him of "clean" mackerel, that if the purchaser finds that the fish delivered to him "are rusty fish he is entitled to cull out the rusty fish and have an allowance of half price for the rusties," must bear the expense of the culling out; and, if the fish were delivered to him in Boston and, under the circumstances, in order to make them salable except as "rusty" mackerel, it was necessary to re-sort and repack them, which could not be done economically in Boston, the purchaser in order to avail himself of the custom must bear the expense of transporting the fish to a place where they could be re-sorted and repacked economically as well as the expense of such re-sorting and repacking.

LORING, J. This is an action for breach of warranty in the sale of three hundred and fifty barrels, and for the breach of an executory contract for the sale by description of forty-one barrels of salt mackerel. The plaintiffs' firm did business in Gloucester and the defendant company in Lunenburg, Nova Scotia. One of the plaintiffs' employees, McKinnon by name, had seen the three hundred and fifty barrels on a wharf in Lunenburg in the first week of November, 1906. By an interchange of telegrams between the parties on November 10, 1906, the plaintiff bought the three hundred and fifty barrels, agreeing to pay \$14 a barrel for large mackerel and for the medium and small "what they are worth." It is stated in the bill of exceptions "that several small lots of salt mackerel came to the defendant's place of business within a few days after McKinnon's visit, and that these lots were sent to Yarmouth and shipped with the larger lot." All the mackerel were shipped from Lunenburg to Yarmouth, Nova Scotia, where they were put on the Boston steamboat. The invoice of both lots was as follows: Large mackerel: three hundred and fifty barrels and eighteen half barrels, at \$14 a barrel, amounting to \$5,026. Medium mackerel: Eight barrels and eight half barrels, at \$10 a barrel, amounting to \$120; and small mackerel, nineteen barrels and two half barrels, at \$7.50 a barrel, amounting to \$150; the whole price being \$5,296, to which was added \$2.50 for consular papers, making a total of \$5,298.50. For this the defendant drew two drafts on the plaintiffs which were paid.

By direction of the plaintiffs the fish were shipped to a Boston

firm who were instructed to sell them for the plaintiffs. The plaintiffs' Boston agents sent to the plaintiffs' customers half a dozen samples of five barrels each, which were returned as rusty mackerel. Thereupon one of the plaintiffs "examined the lot of mackerel" and found it to be a fact that rusty mackerel were packed in the middle of all of the barrels, with clear fish at each end. On finding this the plaintiffs shipped the fish to their wharf in Gloucester at a cost of \$114.50, and there unpacked, re-sorted and repacked them at a cost of \$177.75. One of the plaintiffs testified that there was no place in Boston where that could be done economically. The same plaintiff also testified that "the fish were not salable except as rusty mackerel until they were repacked and that after repacking, the clear fish were salable as clear mackerel and the discolored ones as rusty mackerel."

The result of the sorting and repacking was: Large mackerel: one hundred and fifty-two barrels of these were rusty. for which the plaintiffs claimed \$7 each, amounting to \$1,064; one barrel marked large mackerel contained sour mackerel, for which they claimed \$14, and one contained herring, for which they claimed \$14, making a claim on large mackerel of \$1,092. Medium mackerel: seven and one half barrels medium mackerel were mixed with large and so sold; and ten barrels and four half barrels medium mackerel were marked and sold as large, on which the plaintiffs claimed \$4 a barrel, amounting to \$78; also four barrels and four half barrels of the medium were rusty, for which they claimed \$5 a barrel, amounting to \$30, making the total claim on medium mackerel \$108. No claim was made on the small mackerel. The defendant had agreed to make the price of small fish \$6.50 in place of \$7.50, at which they were invoiced. The plaintiff's whole claim therefore was (1) for difference between invoice price of small fish and price later agreed upon \$20 (not contested); (2) breach of warranty and of contract in delivering rusty fish and medium as large mackerel, \$1,200; and (3) cost of sorting and repacking, \$292.15.

1. At the trial * the plaintiff was allowed to prove that in the fish trade "The custom is when a party purchases a lot of mackerel he is supposed to receive clear fish. If he finds they are rusty fish he is entitled to cull out the rusty fish and have an

^{*} Before Bell, J.

allowance of half price for the rusties." What the plaintiff was allowed to prove by the first part of this custom was that the word "mackerel" in the fish trade has a trade meaning, namely, clear mackerel, not rusty mackerel. That was admissible. Mooney v. Howard Ins. Co. 138 Mass. 375. Eldridge v. McDermott, 178 Mass. 256. The second part of the custom is to supply by usage a basis of settlement in case of breach by delivering rusty in place of clear fish. Such an arrangement could have been made by an express agreement and the existence of the usage dispensed with the necessity of making it expressly. In our opinion it is not a usage which is contrary to the rule of law and so bad within Dickinson v. Gay, 7 Allen, 29. See in this connection Barrie v. Quinby, 206 Mass. 259.

The defendant objected to the evidence on the ground that this was a sale of specific barrels which McKinnon saw and inspected, and that the plaintiffs received those barrels and consequently that is an end of their case. In any event this reasoning applies to the three hundred and fifty barrels only and not to the forty-nine barrels. But that is of no consequence because it is not correct. It is settled in this Commonwealth that in the sale of specific goods as goods of a specified description, the description amounts to a warranty that they are as described. is also settled that the fact that the specific goods were open to inspection and were in fact inspected by the buyer does not deprive him of his right to rely on such a description as a warranty, if the difference between the specific goods and the description of them would not have been and was not detected on the inspection. Both points were decided in Henshaw v. Robins, 9 Met. 88, where they were considered at length. For later cases see Harrington v. Smith, 138 Mass. 92; Gould v. Stein, 149 Mass. 570. And see also the cases of Edgar v. Breck & Sons Corp. 172 Mass. 581; Putnam-Hooker Co. v. Hewins, 204 Mass. 426, where the first rule stated above was applied to an executory contract of sale in which the goods were to be identified by description.

The fact, if it be a fact, in the case at bar that the bargain was completed in Nova Scotia where the defendant's offer was accepted by the plaintiffs' telegram being despatched is of no consequence. There was no evidence that the law which obtains in Nova Scotia differs from our own.

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The exceptions taken to the admission of the custom must be overruled. The fifteenth and sixteenth rulings asked for by the plaintiffs * and given by the judge stand on the same footing and the exception taken to them must also be overruled.

- 2. The testimony of McKinnon that he would have made a further examination of the barrels of fish here in question if he had not been told that they had been sold to a third person, was competent as showing that he did not make a thorough inspection. If McKinnon by his inspection had learned of the presence of the rusty mackerel in the middle of the barrels, the plaintiffs' claim on that ground so far as the three hundred and fifty barrels are concerned could not have been maintained.
- 3. The sixth ruling asked for by the defendant was in these words: "A warranty as to quality or condition of the mackerel cannot be implied into this case by evidence of custom or usage." This was not given in terms, but the judge told the jury that if they found the custom testified to they could allow one half the cost price for the rusty mackerel. Under the custom clear mackerel and rusty mackerel are in the trade different grades of mackerel, not different qualities of the same grade of mackerel; and so this case does not come within Dickinson v. Gay, 7 Allen, 29. The rule adopted in that case never was law in many jurisdictions (see Williston on Sales, § 246) and has been changed in the sales act. St. 1908, c. 237, Part I. § 15 (5).
- 4. The last exception of the defendant is to the charge on the cost of unpacking, sorting and repacking. What the judge said was this: "If these fish came from Nova Scotia in such a condition that in order to determine the fair price and in order to put them into marketable condition it was necessary to repack them, perhaps I may state that again and have it accurate. If they came from Nova Scotia in such a condition that it was necessary in order to determine the price between the parties under the contract that they should be re-examined and re-packed, it would

[•] These were as follows:

[&]quot;15. If the jury find the existence of a custom, that the seller shall make an allowance of one half the contract price to the buyer for rusty fish, the plaintiffs are entitled to recover one half the purchase cost of all the rusty fish which were delivered.

[&]quot;16. The defendant is bound by a general custom of the trade, even though its agents were not familiar with it."

be an expense which would be fairly chargeable to the defendants, and if there was an expense of that kind which was a reasonably fair expense it would be chargeable to them."

If the plaintiffs had relied on the market value of the rusty mackerel as the measure of their damages, they could have recovered this expense as an expense for doing something of which the defendant has taken the benefit (see Rowe v. Peabody, 207 Mass. 226; Dickinson v. Talmage, 138 Mass. 249), and also as the consequences of the breach of warranty and of contract (see Whitehead f Atherton Machine Co. v. Ryder, 139 Mass. 366). But the plaintiffs relied on the custom and not on the market value. By the terms of the custom, to entitle themselves to "half price for the rusties" the plaintiffs had to bear this expense. The custom was that the purchaser "is entitled to cull over the rusty fish and have an allowance of half price for the rusties." This expense was incurred by the plaintiffs for their own benefit (to entitle themselves under the custom to half price for the rusty mackerel) and not for the benefit of the defendant.

The result is that there must be a new trial on damages unless the plaintiffs remit \$292.15 with interest from the date of the writ. The order will be that unless that sum be remitted within thirty days the exceptions shall be sustained, the new trial being confined to damages only.

So ordered.

- S. R. Jones, for the defendant.
- A. B. White, (P. Ketchum with him,) for the plaintiffs.

COBA A. PULLEN vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. January 12, 1911. — March 4, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Damages, In tort. Practice, Civil, New trial.

In an action of tort by a woman for personal injuries, an instruction by the presiding judge, that the plaintiff has a right to have the jury consider the possibility that by reason of the plaintiff's injuries an operation in the future may be necessary, is erroneous, when it is not limited by a further instruction that the plaintiff

can recover only for such consequences of her injuries as it is proved by a reasonable preponderance of the evidence reasonably may be expected to follow. In an action of tort for personal injuries, where, after a verdict for the plaintiff, an exception of the defendant was sustained on account of an erroneous instruction by the presiding judge upon the matter of damages, a new trial was ordered on the question of damages only.

TORT for personal injuries alleged to have been sustained by the plaintiff on June 13, 1907, while she was entering a car of the defendant at the defendant's Sullivan Square station in that part of Boston called Charlestown, by reason of the door of the car closing upon her. Writ dated September 17, 1908.

In the Superior Court the case was tried before *Hitchcock*, J. The counsel for the defendant called the attention of the judge to the portion of his charge upon the question of damages which is quoted in the opinion, and the judge, as stated in the opinion, refused to change it. The jury returned a verdict for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

H. D. McLellan, for the defendant.

W. J. Corcoran, for the plaintiff.

LORING, J. The presiding judge told the jury that "if the [plaintiff's] physical condition is such that it may, or may not, involve future expense, she would be entitled to have that considered"; also, "If it [the plaintiff's physical condition] did not necessarily involve that [future expense], but it might happen in the future, that would be a thing for you to consider as in the future"; and lastly, the bill of exceptions states that "The judge further instructed the jury that the plaintiff would have the right to consider the 'possibility that an operation in the future might be necessary' on the question of damage." We interpret this last part of the charge to mean that the judge told the jury that the plaintiff would have the right to have the jury consider the possibility that an operation in the future might be necessary.

A plaintiff is entitled to compensation for all damages that reasonably are to be expected to follow, but not to those that possibly may follow, the injury which he has suffered. He is not restricted to compensation for suffering and expense which by a fair preponderance of the evidence he has proved will inevitably follow. He is entitled to compensation for suffering and expense which by a fair prepoderance of the evidence he has satisfied the jury reasonably are to be expected to follow, so far

as human knowledge can foretell. There are many cases where the suffering and expense following an injury cannot be foretold with exactness. The fact that suffering and expense cannot always be foretold with exactness is a fact which the jury have to deal with in determining what suffering and expense reasonably will follow as distinguished from what possibly may follow. Fry v. Dubuque & Southwestern Railway, 45 Iowa, 416. Strohm v. New York, Lake Erie & Western Railroad, 96 N. Y. 305. Chicago City Railway v. Henry, 62 Ill. 142. Further cases are collected in 13 Cyc. 31, 32. See also Sedgwick, Damages, (8th ed.) § 172.

It is probable that the presiding judge did not intend to go further than to tell the jury that in case of the injury here in question human knowledge could not foretell the future with exactness, and that they must consider that fact in determining what it was proved by a fair preponderance of the evidence were the damages which were reasonably to be expected to follow, as distinguished from those that might follow.

But what the judge said was not so limited. The jury might well have understood that they were at liberty to give damages for what might happen as distinguished from what was reasonably to be expected would happen. Taking the last part of the charge as an example: The jury might well have understood that they could consider and give the plaintiff damages for the possibility that an operation in the future might be necessary, although they were not satisfied by a fair preponderance of the evidence that so far as could be foretold it was reasonably to be expected that it would be necessary. The judge's attention was called to this part of the charge and he refused to modify it.

The result is that the exceptions must be sustained but the new trial must be confined to damages.

So ordered.

JAMES P. STEWART vs. EDGAR L. FULLER & others, trustees.

Suffolk. January 13, 1911. — March 4, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Practice, Civil, Judge's charge. Evidence, Failure to call witness.

In an action of contract for the price of coal sold and delivered, the plaintiff in testifying referred to his day book, which was not put in evidence, and explained that it was his practice when an order was given to write it out on a piece of paper, which was kept until the order was filled by the delivery of the coal, and that then the order and the method of filling it were entered on the day book and the slip was thrown away. The plaintiff used the day book to refresh his recollection both on his direct examination and on his cross-examination. The defendant denied that the coal was ordered or was delivered. The judge in the course of his charge said to the jury, "There are on the one hand the books, a record made of a sale, and on the other hand the memory of a man." The defendant excepted to this on the ground that the judge assumed that there was a record in evidence, the account book of the plaintiff. Held, that this exception could not be sustained, because the presiding judge in referring to the plaintiff's account book did not say or assume that it was in evidence.

In an action against three trustees, for the price of coal alleged to have been delivered at a building owned by the defendants, where the defendants denied that the coal was ordered or was delivered, the plaintiff testified that he had sold coal to the defendants before on an order given by F, who was one of the defendants, and that he was sure that F had ordered the coal for the defendants although he knew that F was also a trustee of another real estate association in the same town. The defendants did not call F as a witness, and the judge in the course of his charge instructed the jury that if they thought that F should have been produced as a witness by the defendants they could give such weight as they thought fit to the fact that he had not been produced. Held, that there was no error in this instruction.

A charge of the judge presiding at a trial, which was objected to as argumentative, here was held not to be in violation of R. L. c. 173, § 80, under the rule laid down in Whitpey v. Wellesley & Boston Street Railway, 197 Mass. 495.

CONTRACT for the price of coal sold and delivered, as stated in the opinion. Writ in the Municipal Court of the City of Boston dated April 15, 1907.

On appeal to the Superior Court the case was tried before White, J. The questions which arose at the trial are stated in the opinion.

A portion of the charge of the judge, which included the parts to which the defendants objected and excepted, was as follows:

"Here is the scheme of the plaintiff's argument. 'This order

came to me. In the regular course of business it was put on my books, it there remains. I sent it out with drivers who knew the place, and the drivers say they knew the place, and they delivered it at the place.'

"On the other hand, the defendant is claiming that his memory is sufficient against the record and against the evidence; that his remembrance ought to govern, and that is, that out of his memory he says that he is able to say that the coal was not delivered. There is a suggestion made by the introduction of Freeman as the trustee, or one of the trustees of the Everett Real Estate Association, that it might have gone there, Freeman has not testified. When a witness is introduced as knowing something about the possible outcome of a trial, and as being able to bring some information and he is not brought by the party who would naturally bring him, whom you would naturally expect to bring him, you have a right to infer from his absence that if brought his evidence would not be favorable. Now, Freeman being an associate of Fuller, if there is any intimation that the coal went to Freeman's building instead of to Fuller's building, whether there was any obligation to bring him here to inform you of that fact is for you to determine. say there was no obligation, you will disregard it. If you say he is getting up such a claim as that and Freeman should be brought here, you have the right to draw whatever inference you say you ought to draw from the fact that he is not brought Whether you say he ought to have brought him or not is entirely for you to judge.

"There are on the one hand the books, a record made of a sale, and on the other part the memory of man, and it is for you to determine with the burden of proof upon the plaintiff. The burden is upon the plaintiff in this as in every other case to establish the fact of a sale and delivery by a fair preponderance of the evidence; and that, as I have told you in previous cases and as the counsel for the defendant has reiterated here, if it leaves you in just a balanced state of mind, that does not sustain the burden of proof. The burden of proof is only sustained when the scales tip in favor of the propositions that one party or the other must establish in order to maintain the action."

"On the matter of the record, I said a record made in the



ordinary course of business. In so far as that is any instruction to you that this record was made in the ordinary course of business, so much as I said of that, I withdraw and leave it to you to say whether the charge was made in the ordinary course of business, and if it was, what effect you ought to give it."

The defendants' exceptions were, first, to the sentence of the charge which is quoted in the opinion, second, to the portion of the charge referring to the failure to produce Mr. Freeman as a witness, and, third, to the charge as being argumentative.

The jury returned a verdict for the plaintiff in the sum of \$75.15; and the defendants alleged exceptions.

- A. E. McCleary, for the defendants.
- T. J. Boynton of W. P. Dyer, for the plaintiff, were not called upon.

LORING, J. This was an action for the price of ten tons of The plaintiff testified that he took the order over the telephone from the defendant Fuller, and Fuller testified that he never gave it. In the course of his testimony the plaintiff referred to his day book which was not put in evidence. He explained that it was his practice when an order was given to write it out on a piece of paper which was kept until the order was filled by the delivery of the coal. Then, after the order stated on the slip had been filled, it and the method of filling it were entered on the day book and the slip was thrown away. The plaintiff used the day book to refresh his recollection both on direct and cross-examination, and without objection. defendants were three trustees who owned the building in question. On cross-examination the plaintiff testified that he had sold coal to the defendants before on an order given by Freeman who was one of the trustees. He was sure that Freeman had ordered coal for the defendants although he knew that Freeman was also trustee of another real estate association in the same town. The three teamsters whose names appeared on the day book as having delivered the coal testified that they did deliver it and the defendant's janitor testified that no coal was delivered at that time.

In the course of his charge to the jury the judge told them that "there are on the one hand the books, a record made of a sale, and on the other part the memory of man." To this part of the charge the defendants took an exception. Their argu-

ment in support of that exception is that the judge assumed that there was a record in evidence, the account book of the plaintiff. The plaintiff's account book was not in evidence and the presiding judge did not say or assume that it was.

The judge also told the jury that if they thought Mr. Freeman should have been produced as a witness by the defendants they could give such weight as they saw fit to the fact that he had not been produced. There was no error in that.

The last exception is on the ground that the charge of the judge was argumentative, and in support of that contention the defendant has relied on Blackburn v. Boston & Northern Street Railway, 201 Mass. 186, and Whitney v. Wellesley & Boston Street Railway, 197 Mass. 495. We find nothing in the first of these cases which bears on this question and the charge is not a violation of R. L. c. 173, § 80, within the rule laid down in the second.

Exceptions overruled.

ROBERT B. HYSLOP vs. BOSTON AND MAINE RAILROAD.

Suffolk. January 16, 1911. — March 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence. Railroad. Evidence, Presumptions and burden of proof.

If a railroad corporation receives a freight car, which is loaded with fixtures for a restaurant conducted by a lessee of the corporation in its station, and places the car on the track third from the station opposite the door of the restaurant, which is the most convenient place for unloading the fixtures but also is a place attended with great danger because the two intervening tracks are the main tracks of a division of the railroad, on which trains pass frequently in opposite directions, it becomes the duty of the railroad corporation to take the precautions necessary to protect the men engaged in the work of unloading the car after the unloading begins and while it lasts, but this responsibility does not arise until the time for unloading comes, and, if before the consignee of the fixtures or the seller of the fixtures, who has agreed to unload and install them, has been notified by the railroad corporation that the car is ready for unloading, the seller of the fixtures orders his workmen to start to unload it and one of the workmen on his way to the car is run over by a train on one of intervening main tracks, there is no negligence or evidence of negligence on the part of the railroad corporation. In such a case the fact that the car has been brought up to the place from which it ultimately is to be unloaded does not justify the consignee in inferring that the time for unloading has come.



The fact that a jury have a right to disbelieve certain testimony does not make such disbelief affirmative evidence to the contrary, its only result being to eliminate the testimony disbelieved.

TORT for personal injuries alleged to have been sustained by the plaintiff on October 21, 1905, from being run over by a train of the defendant at its station on its Fitchburg division at Greenfield. Writ dated March 12, 1906.

In the Superior Court the case was tried before *De Courcy*, J., together with another action for the same injuries against the plaintiff's employer, one McLean.

The following facts appeared:

The plaintiff was a carpenter in the employ of McLean, a maker of store fixtures in Boston. One Wood was the proprietor of a restaurant in the station of the defendant's railroad at Greenfield. He occupied two rooms, one a dining-room and the other a kitchen, under a written lease from the defendant. Wood made a contract with McLean whereby McLean was to make and install new fixtures in the dining room. When the fixtures were made, McLean shipped them over the defendant's railroad from Boston to Greenfield, consigned to Wood. They filled a furniture car. This car was transported in usual course and arrived at Greenfield.

McLean and his men, including the plaintiff, went to Greenfield by a regular passenger train. They never had been there before. The station at Greenfield serves two divisions of the railroad. Trains from Boston on the Fitchburg division draw in on the left; those from Springfield on the Connecticut and Passumpsic division draw in on the right. These are the main lines. The second track from the station on the left is the main line for Boston. The second track from the station on the right is the main line for Springfield. The approach to the station is through a freight yard with many tracks. The furniture car, after reaching the Greenfield yard, was shifted to a track on the Connecticut and Passumpsic Division. It was on the third track on the right side of the station and next to the main track for south bound trains.

McLean and his men reached the station on the left hand side. Wood met them. They went inside and had dinner. During dinner they saw the furniture car go by the window on a track outside on the right. When dinner was over, McLean directed them to go to the car. The plaintiff left the room a short distance behind a fellow workman. The other workman started along up the station platform. The plaintiff started across the platform and when about four or five feet from the edge of it looked in both directions. Thence he walked, without looking again, and was struck by the engine of a passenger train from the south on the second track.

The evidence at the trial and the rulings of the judge in regard to the admission of evidence are described in the opinion.

By agreement of the parties a verdict was returned for the defendant in the action against McLean. In the action against the railroad corporation the judge ordered a verdict for the defendant, and by agreement of the parties reported the case for determination by this court.

If upon the evidence legally admissible against the defendant railroad corporation the jury would be warranted in returning a verdict for the plaintiff against that defendant, judgment was to be entered for the plaintiff in the sum of \$12,000 with costs; otherwise, judgment was to be entered on the verdict for the defendant railroad corporation.

- A. T. Smith, (C. W. Bartlett with him,) for the plaintiff.
- A. R. Tiedale, for the defendant.

LORING, J. The plaintiff was run down by a passenger train of the defendant railroad corporation as he was crossing its two main tracks at Greenfield to unload a freight car on the third track, the track next beyond the two main tracks. The freight car in question was loaded with fixtures for the restaurant in the Greenfield station which Wood, the proprietor of the restaurant, had bought of one McLean, the plaintiff's employer. By the terms of the agreement of purchase McLean was to put the fixtures in place in the restaurant, and McLean's son as foreman had come from Boston on the day in question with four workmen to do that work. The plaintiff was one of these workmen. We shall hereafter speak of McLean's son, the foreman, as McLean.

The jury were warranted in finding that when the plaintiff undertook to cross the intervening tracks to unload the freight car it had been placed on the third track, in the position in which it was when finally unloaded; and that it had been placed there by the defendant's yard crew under orders given by its yard master.

The point on the third track where the car had been placed was opposite the door of the restaurant and was separated from it by the platform and the two main tracks of the Passumpsic Division of the defendant's railroad. The main tracks of the Fitchburg Division were on the other side of the station. It is manifest that the point selected for unloading the car was the nearest point to the restaurant and so the most convenient. But it is equally manifest that the work of unloading the car at that point was attended, or might be attended, with great danger. Under these circumstances it became the defendant's duty, when the unloading began and while it lasted, to take the necessary precautions to protect the men engaged in the work of unloading it, Bachant v. Boston & Maine Railroad, 187 Mass. 392, that is to say, to protect McLean's employees who were to do the work of unloading for Wood the consignee.

The presiding judge was right in directing a verdict for the defendant because the plaintiff failed to prove that at the time of the accident the defendant was ready to have the work of unloading begin. This case against the railroad was tried with one against the plaintiff's employer. During the trial the presiding judge admitted all evidence competent against either defendant, reserving the question of its admissibility against a particular defendant to be decided at the close of the evidence.

There was great conflict in the evidence. But, taking the view of it most favorable to the plaintiff, the facts which the jury were warranted in finding were these: The foreman with the plaintiff and his fellow workman arrived on the passenger train from Boston at 12.80. They were met by Wood. The foreman asked Wood whether the car containing the fixtures had arrived. Wood said that it had and that he would have it brought up. He also told the foreman to leave their overalls and tools in the kitchen and go into the restaurant and have dinner. There was some fifteen minutes delay in the dinner. But while they were eating Wood came to the foreman and said "The car is here. Is that all right for you?" and McLean looked up, saw the car in the position it was in when the accident happened

and when it was finally unloaded, and said it was. After dinner and after the men had put on their overalls and got their tools, McLean told the plaintiff to go out and open the car and it was in obedience to that order that the plaintiff crossed the southbound track and was in the act of crossing the northbound track when he was run down by the passenger train which arrived at Greenfield from Boston at 1.37. There was no direct evidence that the defendant had authorized Wood, the consignee of it, to begin to unload the car. Wood, who was called as a witness by the plaintiff, testified that he left the station at one o'clock and was away until after the accident. He further testified that so far as he could remember "he had no talk with the station agent at Greenfield in regard to the car upon that day." The station agent, who also was called as a witness by the plaintiff, testified that he left the station at one o'clock on that day and returned about two; that according to the practice of the defendant a yard master would place a car where it was to be unloaded if he knew where that was, but that according to the practice of the yard "the car must not be unloaded until the parties have been notified that the car is placed ready for unloading and after that time, in a place like that, there would be protection. . . . The agents or some of his representatives would be on hand to see that while they were carrying the counters over or unloading that there were no trains coming or to notify them of the approach of any train. . . . I was the only one to determine when a car should be unloaded." In addition he testified that "he had not notified the consignee, Mr. Wood, that this car was ready for him to unload . . . that at the time he was present he had not told Mr. Wood or anybody that the car was ready to unload."

The plaintiff has contended that there was evidence which warranted the jury in finding that the station agent told Wood before the plaintiff crossed the tracks that the car was ready to be unloaded. The evidence on which this contention is made was elicited on the redirect examination of the station agent. He was then asked if he notified Wood at any time in any way before the time that the car was unloaded that he had determined that it should be unloaded, and he said, "I presume I did. . . . I saw him or his head man, undoubtedly." Then in

answer to the question "What time of day was it that you saw him," he answered, "After I returned from my luncheon." He testified further that "it must have been at the station, of course," and in answer to the question, "You saw Mr. Wood at the station," he answered, "I can't say that I did." All that this meant or could be found to mean was that he told Wood that the car was ready to be unloaded before it was in fact unloaded after the accident. It is not a statement that he told Wood before 1.37 o'clock that the car was ready to be unloaded then, and it does not warrant the jury in finding that he told him that before that hour.

The fact that this car had been brought up to the point from which it was ultimately to be unloaded did not warrant Wood the consignee in inferring that the time for unloading it had come.

The plaintiff has insisted that the jury were warranted in disbelieving the station agent and Wood. But his case is not helped if they did disbelieve either or both of them. The fact, if it is a fact, that the jury disbelieved Wood and the station agent when they testified that no notice to unload was given is not evidence that such notice was given. Beers v. Prouty & Co. 208 Mass. 254. The only result of that is that their testimony is eliminated. If their testimony is eliminated the circumstances only are left, and we have already held that the circumstances did not sustain the burden (which was on the plaintiff) of proving that the defendant was ready to have the consignee begin to unload the car.

The presiding judge ruled that the conversation between Wood and McLean's foreman was not admissible as against the defendant, and (as we have said) directed a verdict for the defendant. For the reasons given this ruling was right.

In accordance with the terms of the report the entry must be Judgment for the defendant. FRANKLIN N. GILSON, administrator, vs. ISRAEL NESSON.

Suffolk. January 27, 1911. - March 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Mortgage, Of real estate, foreclosure sale. Estoppel.

A mortgagee, who has foreclosed a mortgage of real estate under a power of sale contained therein, is not estopped by a recital in an affidavit made by him under R. L. c. 187, § 15, as amended by St. 1906, c. 219, § 2, and annexed to his deed given under the power of sale, that he sold the real estate for \$12,500, from showing, in an action on the mortgage note for the balance due after crediting the proceeds of the sale, that the property was sold at the foreclosure sale for only \$10,000.

CONTRACT, by the administrator of the estate of Mary E. Walker, for a balance alleged to be due upon a note secured by a mortgage given by the defendant to the plaintiff's intestate upon certain real estate, after crediting the proceeds of a fore-closure sale of the estate. Writ dated March 3, 1906.

In the Superior Court the case was tried before Fessenden, J., without a jury. At the trial the plaintiff introduced in evidence the note with the indorsements thereon, and rested. The defendant introduced evidence tending to show a release of the defendant from further liability on the note. The plaintiff in reply introduced evidence tending to contradict and meet the evidence introduced by the defendant.

It appeared in evidence that an entry to foreclose the mortgage under the statute was made by the plaintiff's intestate on January 30, 1904; that a foreclosure of the mortgage was made under the power therein contained, and that a sale of the property was made on February 29, 1904, the defendant paying all the expenses of the foreclosure sale. Evidence was introduced tending to prove that the plaintiff's intestate never made any claim upon the defendant for payment of this note or any part thereof during her lifetime, she having died in October, 1905.

It further appeared that when the property was offered at public auction at the foreclosure sale, after some preliminary statements descriptive of the property and the terms of sale, bids were invited and that various bids were made; that one Ballou was present acting as the agent of the plaintiff's intes-

tate. Mr. Walbridge, an attorney at law, testified that he was at the foreclosure sale for his office, that he did not know whether he represented Mrs. Walker or the defendant, that he made the bid for the mortgagee, that he went to the sale supposing that he represented the mortgagee, that he did not know at the time that he was representing the defendant. Ballou made bids for Mrs. Walker, the plaintiff's intestate, ranging from \$10,000 until finally a bid was made in her behalf of \$12,500. There was evidence tending to show that this bid was made either by Ballou or Mr. Walbridge. Other persons were bidding, and one Millen bid \$12,505, and the property was struck off to him. He failed to comply with the terms of the sale, which were \$300 in cash down. He offered his check for this amount, which was refused by the auctioneer. The property then immediately was put up again and was struck off to Ballou, the agent of Mrs. Walker, for \$10,000. Millen testified that he attended the sale at the request and in behalf of the defendant to bid in the property as high as it was necessary to bid to cover the mortgage. The defendant contradicted this in his testimony.

In the deed of this real estate, under the power in the mortgage, executed by the mortgages to herself, the consideration was named as \$12,500, and in the affidavit as to compliance with the terms of the power of sale, required by R. L. c. 187, § 15, as amended by St. 1906, c. 219, § 2, which was annexed to the deed, the plaintiff's intestate made oath that she sold the real estate for the sum of \$12,500.

At the close of the evidence the defendant asked for ten rulings, all of which the judge made except the first.

The first ruling requested was as follows: "1. That the affidavit in the deed of foreclosure of Mary E. Walker cannot be contradicted and must be taken as true." The judge refused to make this ruling. He found for the plaintiff in the sum of \$4,368.95; and the defendant alleged exceptions.

- L. M. Friedman, for the defendant.
- C. A. Bunker, for the plaintiff.

BRALEY, J. The finding for the plaintiff upon conflicting evidence disposes of the defense, that for a new consideration accepted by her and executed by the defendant the plaintiff's VOL. 208.

intestate, who was the mortgagee, agreed to take the mortgaged property under foreclosure proceedings in satisfaction of the mortgage debt, and also establishes all material facts involved in the controversy upon which the right of the plaintiff to recover depended. American Malting Co. v. Souther Brewing Co. 194 Mass. 89.

The mortgagee purchased the property at the sale, and the defendant, having advanced the expenses of foreclosure, is to be credited with the purchase price, and only the balance of the indebtedness can be recovered in the present action. The actual sale was for \$10,000. But, as the deed and affidavit under the power of sale stated the consideration and the amount of the bid to have been \$12,500, the defendant contends that this sum must be credited, and that the judge erred in refusing to rule that the affidavit could not be contradicted and must be taken as true. If as between the parties the actual consideration of the contract may be shown although the recital in the deed of conveyance is different, so the affidavit is not conclusive, but is for the preservation of evidence showing compliance with the conditions of the power of sale. It would be a novel proposition for the defendant to assert, that, if the sale had been for more than the amount named in the affidavit, he could not prove and be credited with the excess, or, if in fact a surplus had resulted, that the mortgagee would not have held the money to his use. The recitals being evidentiary only, do not work a mutual estoppel, and may be contradicted by either the mortgagor or the mortgagee. Rose v. Taunton, 119 Mass, 99, 100. Farquhar v. Farquhar, 194 Mass. 400, 405. Atkins v. Atkins, 195 Mass. 124, 127. Brouillard v. Stimpson, 201 Mass. 236, 238.

It is further urged that, by the acts of her agent at the sale and by taking and retaining title in connection with a formal declaration in writing, she acquired the property for a price which was the highest accepted bid, although the decisive bid was much less, the intestate, by whose acts and conduct the plaintiff would be concluded, was therefore estopped from taking a different position to the plaintiff's disadvantage and injury, or elected to be bound by the amount stated in the affidavit or waived the right to rely on the final bid. A short answer to this contention would be, that, not having been pleaded, it

is not open under the answer containing only a general denial, with averments of payment and of accord and satisfaction. Kidder v. United Order of Golden Cross, 192 Mass. 326. It, moreover, is doubtful whether it is open under the terms of the request. But, if we pass these objections, as the plaintiff does not suggest or rely on them, the necessary elements of an equitable estoppel do not appear. The evidence warranted a finding, notwithstanding his denial, that the defendant was represented at the sale by an agent who was instructed "to bid in on the property as high as it could be bid to cover the mortgage." If the bids of the respective agents were apparently simultaneous, and for the larger sum, the failure of the defendant's agent, to whom the property was struck off, to comply with the terms of sale caused the auctioneer again to put the property up, when it was sold to the mortgagee at the price the plaintiff contends should be credited on the note. The sale seems to have been conducted in good faith, without any misrepresentations or concealment of material facts, and the defendant, being charged with the knowledge of his agent, could not have been misled as to the effect of what took place, or by the subsequent erroneous recital in the affidavit. Plymouth v. Wareham, 126 Mass. 475, 478. Stiff v. Ashton, 155 Mass. 180. DeFriest v. Bradley, 192 Mass. 346, 354.

Nor was there an estoppel by election. The recital, as we have said, was not contractual, or the affidavit essential to the efficacy of the deed, which under the power was a conveyance by the defendant to the mortgagee of the right of redemption and vested in her an absolute estate. Merrifield v. Parritt, 11 Cush. 590. Claftin v. Boston & Albany Railroad, 157 Mass. 489, 495. Hall v. Bliss, 118 Mass. 554, 559. It also was a question of fact, whether the mortgagee by stating the greater sum in the affidavit, because she thought it might aid her in making a future sale of the property at an enhanced valuation, intended to relinquish to the defendant in reduction of his collateral liability upon the note, the difference between the bids. Kent v. Warner, 12 Allen, 561. Boyden v. Hill, 198 Mass. 477.

Exceptions overruled.

GEORGE H. SAMPSON COMPANY vs. COMMONWEALTH & others.

Suffolk. November 30, 1910. — March 7, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Equity Jurisdiction, To enforce bond given under Pub. Sts. c. 16, § 64, or R. L. c. 6, § 77. Surety.

At a former stage of this case it was decided, as reported in 202 Mass. 826, that the plaintiff who furnished for a contractor labor and materials used for the construction of an aqueduct under a contract made for the Commonwealth by a public board, could enforce for his benefit the bond given by the contractor to the Commonwealth in compliance with the requirement of Pub. Sts. c. 16, § 64, now R. L. c. 6, § 77. After the filing of the bill in equity upon which that decision was rendered the Commonwealth paid to the plaintiff and others, from the funds in its hands reserved by it from moneys due to the contractors, thirtyfive per cent of their respective claims against the contractors, and the contractors assented to these payments. Upon receiving the payment made to him, the plaintiff, with the assent of the surety, released the Commonwealth. The plaintiff applied about half of the money thus received from the Commonwealth to paying for powder which had been used in blasting for the public work, for which the plaintiff was entitled to have the liability of the surety on the bond of the contractor enforced. The rest of the money so received from the Commonwealth the plaintiff applied in paying for fittings of machinery, tools and other supplies, for which the surety on the bond of the contractor was not liable, all of the claims thus discharged having been filed in the office of the board which made the contract for the public work. The surety contended that the whole of the money received from the Commonwealth should be applied toward the payment of the bill for powder and thus reduce the surety's liability to that extent. Held, that, there having been no agreement between the parties as to the application of the money, the plaintiff could apply the payment as he saw fit, and the fact that the surety was liable only on a part of the plaintiff's claim against the contractor did not give the surety the right to have the whole of the money received by the plaintiff applied to that portion of the plaintiff's claim.

MORTON, J. This case was before this court and is reported in 202 Mass. 326. One of the questions then before the court was whether the right to compel the surety on the bond which the Commonwealth had taken from the contractors pursuant to Pub. Sts. c. 16, § 64, (now R. L. c. 6, § 77,) to make payment for the benefit of the plaintiff could be enforced in that suit, and it was held that it could be so enforced. Another of the questions was whether the plaintiff was entitled to a lien for the powder which it had sold to the contractors and which they had

expended in excavating the trench for the aqueduct by blasting out rock the greater part of which was used in its construction. It was held that the plaintiff was entitled to a lien for the powder so used. After the filing of the bill in this case, pursuant to an arrangement between the parties interested, by which no one's rights were to be affected except so far as the amount of the plaintiff's claim might be reduced thereby, the Commonwealth paid to the plaintiff and others, from funds in its hands reserved by it from moneys due to the contractors, thirty-five per cent of their respective claims against the contractors. These payments were made with the assent of the contractors, and, upon receiving the payment made to it, the plaintiff with the consent of the surety released the Commonwealth. The amount so paid to the plaintiff was \$1,793.89. The total amount of the plaintiff's claim was \$5,125.41. That was the sum on which the percentage was calculated. Of that amount \$4,315.71 was for powder which had been used and expended as aforesaid, and the balance, \$809.70, was for fittings to replace worn parts of machinery, tools and other supplies sold and delivered to the contractors for and on account of the work to which their contract with the Commonwealth to build the aqueduct related. The plaintiff applied \$809.70 of the amount received by it to the payment of its bill for fittings, tools and other supplies, and the remainder, \$984.19, to the bill for powder. The surety contended that the whole amount should be applied to the bill for powder. the judges of the Superior Court * ruled in favor of the plaintiff and entered a decree accordingly. The surety appealed.

In addition to the amount received from the Commonwealth the plaintiff was allowed a dividend from the estate of Shanahan, one of the contractors, of \$1,452.97. The costs of collection were \$363.24, and the plaintiff contended that it should be required to credit only the net proceeds. But the judges ruled otherwise and required the plaintiff to credit the whole amount of the dividend. No exception to this ruling and no appeal from the decree was taken by the plaintiff, and no question in regard to that matter is, therefore, now before us.

^{*} Fessenden, Richardson and Wait, JJ. See 202 Mass. 826, 828; Pub. Sts. c. 195, § 3, now R. L. c. 201, § 2.

The Commonwealth has filed no brief and the parties at issue now are the plaintiff and the surety, and the principal question between them is whether the plaintiff had a right to apply the amount received from the Commonwealth as it did. We think that it had the right, and that the ruling of the judges was correct. The surety company contends that the decree should run against the Commonwealth and not against it, on the ground that according to the decree in Nash v. Commonwealth, 174 Mass. 335, the Commonwealth held the money which it paid over as security for the payment of the claims filed with the sewerage board and to the extent to which it paid over the same it discharged the surety company. But this case differs materially from the case of Nash v. Commonwealth, supra, and also from the similar cases of Friedman v. County of Hampden, 204 Mass. 494, and Burr v. Massachusetts School for the Feeble-Minded, 197 Mass. 357. In those cases no bond was taken by the Commonwealth as required by the statute, and unless the provision in the contract giving the public authorities the right to reserve from the contractors money due to the latter were construed as constituting the security required by the statute, the Commonwealth had taken no security. In this case bonds were taken as required by the statute for the express purpose of complying with the statute, and those decisions are not, therefore, applicable. If the money in the hands of the Commonwealth had been reserved for lienable claims as it was in the cases cited above, the surety would have been discharged pro tanto, at least, by any different application of it. Guild v. Butler, 127 Mass. 886. But the money reserved in this case did not come within the rule laid down in those cases.

The money reserved by the Commonwealth from the contractors was due to them generally and not in respect to any particular claims or demands, and it was retained by the Commonwealth under an article in the contract which gave the Commonwealth or the metropolitan water and sewerage board the right to keep any moneys which otherwise at any time would be payable to the contractors, and to apply the same, or so much thereof as the Commonwealth or the board might deem necessary, generally to the payment of claims for labor and materials furnished by parties to the contractors in the prosecution of the

work. The only limitation upon the right of payment by the Commonwealth or the board was that in case notice of any claims had not been filed in the office of the board, the written consent of the contractors was required before the Commonwealth or the board could use for the payment of such claims any of the money that was reserved. There was nothing in the contract restricting the Commonwealth or the board to the payment of claims which were lienable. If there had been, and if a creditor entitled thereto had duly filed his lien and then had attempted to enforce payment by the surety of the amount claimed to be due him, the surety upon payment would no doubt have been entitled to the security, whether by lien or otherwise, held by the creditor, and if the Commonwealth had released the security or had applied the money differently, the surety as already observed would have been released pro tanto. That is the doctrine laid down in Gray v. Seckham, L. R. 7 Ch. 680, and other cases cited by the surety. But as we have said there was nothing restricting payments by the Commonwealth or the board to lienable claims. The list of claims filed with the board and on which thirty-five per cent was paid includes claims for which there was no lien as well as claims for which there was one. No distinction was made between the two. And when the board paid the plaintiff thirtyfive per cent on its claim it paid it on the claim as a whole without regard to its component parts. This payment, as already observed, was assented to by the debtors, the contractors, and is to be regarded as in substance and effect a voluntary payment by them and not as a compulsory payment by operation of law and so coming, as the surety contends, within Commercial Bank v. Cunningham, 24 Pick. 270. There having been no agreement or understanding between the parties as to the application of the money, the plaintiff could apply it as it saw fit, and the fact that the surety company was liable on a portion of the plaintiff's entire demand against the contractors did not give it the right to have the whole amount received by the plaintiff applied to that portion. Brewer v. Knapp, 1 Pick. 382, 337. Upham v. Lefavour, 11 Met. 174, 185. National Mahaiwe Bank v. Peck, 127 Mass. 298. The surety company could have protected itself by a provision in the stipulation signed by it and the other parties interested in regard to payment by the Commonwealth, but not having done so it cannot now object to the application which has been made by the plaintiff. The result is that the surety company is liable for the balance that remains due on the plaintiff's demand, and it was settled when the case was here before that payment could be enforced in this suit against the surety.

We do not see why the plaintiff as the prevailing party is not entitled to costs, nor do we see any reason for changing the rule laid down when the case was here before as to the time from which interest should be calculated. The filing by the plaintiff of its claim with the board constituted a demand from which interest began to run.

Decree affirmed.

- E. A. Whitman, for the United States Fidelity and Guaranty Company.
 - C. H. Waterman, for the plaintiff.

JAMES FORD vs. COCHRANE CHEMICAL COMPANY.

Middlesex. January 11, 1911. — March 7, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence, Employer's liability.

At the trial of an action by an employee against his employer for personal injuries resulting from the falling upon the plaintiff of a derrick, there was evidence tending to show that a guy rope upon the derrick stood the principal strain when a weight of thirty-five hundred pounds was being lifted, that the guy rope was fastened to the top of the mast of the derrick by a hook hitched into an eyebolt five eighths of an inch in diameter, which passed through the mast and was held there by a nut, that the strain on the mast was toward one side of it and that because of the strain the bolt broke just inside of the mast; and experts testified that the method used by the defendant to support the mast was improper and stated in detail a proper method. Held, that the jury were warranted in finding that the defendant was negligent.

TORT for personal injuries received by the plaintiff, as stated in the opinion, while in the defendant's employ. Writ dated September 14, 1909.

In the Superior Court the case was tried before Hardy, J. The material parts of the evidence are stated in the opinion. At the close of all the evidence, the defendant asked the presiding judge "to rule that there was no evidence of negligence . . . for the jury and to order a verdict in its favor." The judge refused so to rule. There was a verdict for the plaintiff; and by agreement of parties the judge reported the case for determination by this court.

- H. C. Sawyer, for the defendant, submitted a brief.
- P. F. Spain, (F. R. Mullin with him,) for the plaintiff.

Knowlton, C. J. This is an action brought against the plaintiff's employer for negligence in the use of a derrick which fell upon the plaintiff and injured him. No question in regard to the plaintiff's care was definitely raised at the trial, and the evidence on that part of the case well warranted a finding in his favor.

The defendant contends that there was no evidence of negligence on the part of the defendant. It was an undisputed fact that the derrick fell while in use in raising an iron pipe weighing about thirty-five hundred pounds, and that, if it had been properly constructed and used, it would not have been likely to fall. The guy rope upon which was the principal strain while the pipe was being raised was fastened to the top of the mast of the derrick by a hook, hitched into an eyebolt five eighths of an inch in diameter, which passed through the mast and was held there by a nut. The evidence tended to show that the strain upon the bolt was towards one side of it, and that this caused it to break off just inside of the surface of the mast. Experts testified that this was an improper method of supporting such a mast, and that there ought to have been an iron band about the mast, with links into which the guy ropes could be hooked, or some other similar arrangement whereby the strain upon the rope would be communicated directly to the body of the mast, and not draw diagonally upon a small eyebolt.

The defendant, through its officers and superintendent, was legally responsible for the use of the derrick in the condition and in the manner in which it was used. There was evidence to warrant a finding that the defendant was negligent.

Judgment on the verdict.

FRANCIS I. AMORY 99. RELIANCE INSURANCE CONTAIL ISAAC WATCHMARRE DE SANE SAME vs. GERMAN FIRE INSURANCE COMPANI.

FRANCIS I. AMORY DE SAME SAME US. FARMERS' FIRE INSURANCE COMPANY.

ISAAC WATCHMAKER DR. SAME FRANCIS I. AMORY VS. AACHEN AND MUNICH FIRE LEST. ANCE COMPANY.

ISAAC WATCHMAKER DS. SAME

Suffolk. January 16, 1911. - March 7, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Russ, J.

Insurance, Fire. Novation. Mortgage, Of real estate: rights to insurance. Co-

At the trial of an action against an insurance company upon a policy of fre is surance in the Massachusetts standard form, brought by the holder of a sense mortgage upon the premises described in the policy, it appeared that on a September 25, previous to the time when the plaintiff received his mortgage, one, who then held a mortgage on the premises and for whose benefit the policy then read, indorsed upon the policy a release of all his interest therein and the mortgagor indorsed upon it "In case of loss pay this policy to A, first mortgage, as his interest may appear, under present or any future mortgages on the insured property. Balance, if any, to [the plaintiff], second mortgagee, as his interest may appear." The insurance company assented to the indorsement. On the same day the mortgage to A and that to the plaintiff were made, and the mortgage to A was delivered to him on the next day, at which time the plaintiff paid a sum of money representing the amount of the mortgages to him and to A and also the amount of all prior mortgages on the property. The mortgage to the plaintiff was not delivered to him until October 6. The representatives of the insurance company had no knowledge of the facts except what might be inferred by them from the papers which they saw. No fraud or concealment was practised. Held, that the mortgagor's indorsement as to payment to the plaintiff in case of loss under the policy should be construed as having reference to the plaintiff's holding under a mortgage already arranged for and made that day, although the mortgage did not take effect by

At the trial of an action against an insurance company upon a policy of fire insurance in the Massachusetts standard form, brought by the holder of a second mortgage upon the premises described in the policy, it appeared that on a September 25, previous to the time when the plaintiff received his mortgage, one, who then held a mortgage on the premises and for whose benefit the

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policy then read, indorsed upon the policy a release of all his interest therein and the mortgagor indorsed upon it "In case of loss pay this policy to A, first mortgagee, as his interest may appear, under present or any future mortgages on the insured property. Balance, if any, to [the plaintiff], second mortgagee, as his interest may appear." The insurance company assented to the indorsement. Subsequently the mortgagor made another mortgage to one who, for default in the performance of its condition, foreclosed it, thus terminating all rights of the mortgagor under the policy. Held, that the release of the holder of the mortgage which was prior to those of A and of the plaintiff and the indorsement of the mortgagor upon the policy furnished a good consideration for the undertaking of the defendant to indemnify the plaintiff after indemnifying A.

: At the trial of an action against an insurance company by a mortgagee of real estate upon a policy of fire insurance in the Massachusetts standard form, which contained the provision that "whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured," it appeared that the defendant had not made any payment or requested any assignment of the plaintiff's mortgage, that the plaintiff, although ready and willing to assign his mortgage to the defendant upon receipt of the amount due thereon, never had offered so to do nor had informed the defendant of such willingness, and that, previous to the fire which had caused the loss, the plaintiff had discharged certain other mortgages which he held under assignment from other mortgagees as further security for his loan. Held, that such facts showed no valid defense to the action, since the defendant had not elected to pay the debt due to the plaintiff and to take an assignment of the mortgage and mortgage note, and since the plaintiff was not required to hold himself in a position to assign to the defendant all his security, but only the mortgage together " with the note and debt thereby secured."

At the trial of an action against an insurance company by a mortgagee of real estate upon a policy of fire insurance in the Massachusetts standard form, the following facts appeared: The policy was issued before the plaintiff had any interest in the premises and was made "payable in case of loss to [a prior mortgagee] as interest may appear." The prior mortgagee assigned his mortgage to the plaintiff, who took and held it as collateral security for an indebtedness of the mortgagor which also was secured by a mortgage given to the plaintiff on the same day as the assignment. Over two months later the prior mortgagee executed upon the policy the following indorsement: "For value received I hereby assign to [the plaintiff] all my interest as mortgagee in this policy." The indorsement was assented to by the defendant. Subsequently the plaintiff discharged the prior mortgage. The interest of the mortgagor in the real estate was cut off by the foreclosure of a mortgage subsequent to that of the plaintiff. Held, that by the discharge of the prior mortgage the plaintiff lost any right he had to payment under the policy.

At the trial of an action against an insurance company by a mortgagee of real estate upon a policy of fire insurance in the Massachusetts standard form insuring a building in Chelsea, it appeared that the interest of the mortgagor had been cut off by the foreclosure of a mortgage subsequent to the plaintiff's, that thereafter the building was destroyed in "the Chelsea fire" on April 12, 1908,

and that the plaintiff gave to the defendant on June 9, 1908, a "sworn statement, setting forth the matters and particulars required by the condition relative thereto contained in "the policy. The condition referred to required the rendering of such a statement to the company "forthwith" after the loss or damage was suffered. Held, following Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 280, that under the policy, where a mortgagee is required to render such a statement, he must furnish "within a reasonable time, proper information in regard to the loss, as to such matters as a mortgagee reasonably may be expected to know"; and that the statement rendered by the plaintiff satisfied the requirements of the policy.

A mortgagee of real estate, to whom was payable in case of loss or damage to the real estate the amount of a policy of fire insurance in the Massachusetts standard form which provided that the company within sixty days after receiving a statement of loss should pay the amount for which it was liable, that amount, if not agreed upon, to be determined by referees to be chosen, on a June 9 rendered the required statement to the company of a loss sustained on the preceding April 12. Held, that the amount due on the policy was payable on August 8, and that, if it was not paid or tendered to the mortgagee at or before that time, he was entitled to interest from that date.

EIGHT ACTIONS OF CONTRACT, the first and second and certain counts of the declarations in the seventh and eight actions being upon policies of insurance against loss or damage by fire of premises numbered 34 on West Third Street in Chelsea, and the third, fourth, fifth and sixth and the remaining counts of the declarations in the seventh and eighth actions being upon policies relating to premises numbered 92 on Arlington Street in Chelsea. Writs dated December 26, 1908.

In the Superior Court the cases were tried together before *Morton*, J., without a jury, upon an agreed statement of facts, the judge being given cower to draw inferences from the facts agreed upon.

Besides the facts stated in the opinion, it was agreed that the buildings insured were destroyed in "the Chelsea fire" on April 12, 1908. On June 9, 1908, the plaintiffs rendered to the respective defendants sworn statements, setting forth the matters and particulars required by the condition relating to such statements contained in each of said policies. Thereafter, the amount of loss and damage not being agreed upon, the matter was submitted to referees under the terms of the policies, who thereupon awarded that the amount of loss and damage on the building, 92 Arlington Street, was \$5,000, and that on the premises, 84 West Third Street, was \$4,600. None of the

defendants made any payment nor requested any assignment of the plaintiff's mortgages. After the award of the referees was made, the defendants refused to pay the amount of the award or any part thereof to the plaintiffs. The plaintiffs never have offered to assign their mortgages to the defendants, but at all times have been and are now ready and willing to assign them to the defendants upon receipt of the amounts due them thereon, but never have informed the defendants of their willingness previous to the bringing of the actions.

The provision in the Massachusetts standard policy, which was in all the policies here involved and under which the plaintiffs claim, is as follows: "and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

In each of the first and second actions, the judge found for the plaintiff in the sum of \$2,192; in each of the third, fourth, fifth and sixth actions, he found for the plaintiff in the sum of \$1,096; in each of the seventh and eighth, he found for the plaintiff in the sum of \$6,028. The defendants appealed.

- F. W. Brown, for the defendants.
- L. M. Friedman, for the plaintiffs.

KNOWLTON, C. J. Each of the two plaintiffs is a mortgagee, who claims under a policy of insurance for a loss payable to him, which resulted from the burning of a building on the mortgaged property. There were two separate estates, and each plaintiff has brought an action against four different insurance companies, each of three of which issued a policy upon the building on the first of these estates. One of these three issued another policy on the building on the second estate, and the fourth also issued a policy on this building. Because of the foreclosure of a later mortgage covering both estates, which worked a change in the title, all the policies became void in the hands of the original insurer, and the claim of the plaintiffs, as mortgagees under their earlier mortgages, rests upon the clause in each policy, under our

Massachusetts standard form, which protects the rights of the mortgagee in such cases.

We have before us four classes of questions: first, whether the respective plaintiffs had the rights of a mortgagee in their several policies at the time of the fire; secondly, whether they severally rendered a sworn statement of the facts concerning their claim seasonably after the fire; thirdly, if they are entitled to recover, in what proportions should claims be charged upon the different defendants; fourth, from what time shall interest be computed.

The plaintiff Amory holds a first mortgage upon each of the two estates, and the plaintiff Watchmaker holds a second mortgage covering both of them. Upon the building on the first estate - that upon Arlington Street - there were three policies of insurance, one for \$3,000 in the Aachen and Munich Company, one for \$1,000 in the German Company and one for \$1,000 in the Farmers' Company. These policies were all taken out by Gotlieb Ancelovitz, the owner of the property, and the first two were made payable in case of loss to M. Dana and L. Levin, mortgagees. On September 25, 1905, these mortgagees indorsed upon each policy a release of all their interest as mortgages, and on the same day Ancelovitz, the insured, signed this indorsement upon each policy: "In case of loss pay this policy to Francis I. Amory, first mortgagee, as his interest may appear, under present or any future mortgages on the insured property. Balance, if any, to Isaac Watchmaker, second mortgagee, as his interest may appear." This was assented to by an authorized agent of each of these two defendants. On the same day the two mortgages upon this property under which the plaintiffs claim to recover insurance were made, one to each of the plaintiffs, although that to Watchmaker was not delivered and recorded until October 6, 1905.

We see no ground for questioning the right of Amory as a mortgagee under these two policies of insurance. The right of Watchmaker is questioned on the ground that his mortgage was not delivered until eleven days afterwards. It does not appear that the insurance companies had any knowledge of the facts, except that which may be inferred from the papers. There was no fraud nor concealment, and the writings must therefore be construed in connection with the facts as they exist, in reference

to which the parties must be presumed to have contracted. It is agreed that, on September 25, Watchmaker paid the sum of \$10,300, which represented this second mortgage of the same date, as well as the principal of Amory's two first mortgages, which were used to pay up prior mortgages upon the property. It is plain, under the indorsement, that the payment to Amory was to be made according to his interest under any future mortgage, as well as under a present one. It appearing that the first mortgage to Amory and the second mortgage to Watchmaker both bore the same date, and that this indorsement on the policy was also on that date, and that Watchmaker is referred to as the second mortgagee in the indorsement, and that he paid the consideration for the mortgage on that day, we are of opinion that the direction to pay and the assent of the company should be construed as having reference to his holding under a mortgage already arranged for, and made that day, although it did not take effect by delivery until a few days later.

The case of Attleborough Savings Bank v. Security Ins. Co. 168 Mass. 147, relied upon by the defendants, was decided upon very different facts.

The release of all interest of Dana and Levin under the policies previously held as security for their mortgage, and the direction by the insured, in the nature of an assignment, assented to by the companies, furnished a good consideration, and the policies were as effectual for the protection of the plaintiffs as if they had then been first issued, payable in this form.

Nor is there any valid defense on the ground of a failure to assign the notes and mortgages to the defendants, as required by the statute if the defendants elect to pay the mortgagee the full amount secured by it. In the first place, the defendants have not so elected. See Eliot Five Cents Savings Bank v. Commercial Union Assurance Co. 142 Mass. 142. Secondly, the release by the plaintiffs of certain other mortgages which they held as collateral security for this mortgage debt does not affect their right to recover. All that in any event they are required to assign and transfer is the mortgage, "together with the note and debt thereby secured." R. L. c. 118, § 60.

The policy of the Farmers' Fire Insurance Company was issued on September 27, 1905, and was, by its terms, "payable

in case of loss to Francis I. Amory, first mortgagee, and balance, if any, to Isaac Watchmaker, second mortgagee." For the reasons already given, we are of opinion that this means "second mortgagee" under the mortgage bearing date September 25, which was delivered soon afterward.

The two policies on the building upon the second estate—that on West Third Street—were made "payable in case of loss to M. Dana and L. Levin mortgagees, as interest may appear:" On September 25, 1905, the mortgage referred to in the policies was assigned to the plaintiffs, who took and held it as collateral security for the indebtedness secured by the mortgages made to them directly on that day. On December 4, 1905, Dana and Levin executed, by indorsement upon each of the two policies referred to, that issued by the Reliance Insurance Company and that issued by the Aachen and Munich Fire Insurance Company, the following assignment: "For value received, we hereby assign to Francis I. Amory and Isaac Watchmaker, all our interest as mortgagees in this policy." This was assented to in an indorsement upon each policy by a duly authorized agent of the company.

This mortgage was discharged by the plaintiffs on February 2, 1906. If we assume, without deciding, that after the assignment of the mortgage to the plaintiffs on September 25, 1905, Dana and Levin held rights under these two policies as trustees for the assignees of the mortgage, and that the assignment of the policies on December 4, 1905, was as effectual in favor of the plaintiffs as if it had been made on September 25, it still transferred to them only the rights held by the mortgagees under that mortgage. They had no other rights, and they could not give the plaintiffs' rights to a payment under these policies for the protection of their interests under another mortgage. Attleborough Savings Bank v. Security Ins. Co. 168 Mass. 147. Palmer Savings Bank v. Ins. Co. of North America, 166 Mass. 189. By the discharge of this mortgage the plaintiffs lost any rights they had to a payment under these policies. As they never have had any rights to insurance upon the property on West Third Street, other than those assigned to them by Dana and Levin as mortgagees, they cannot maintain the actions for insurance upon this property.

The next question is whether the plaintiffs furnished to the defendants such information in regard to the fire as it was their duty to furnish under the contract, if the insured failed to render to the company forthwith a statement under oath as required by the policy. The rights and obligations of the parties, under such circumstances, were considered in Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 230, 235. It was there held that the mortgagee is not required to make his statement forthwith after the fire, but that he must "furnish to the company in writing, within a reasonable time, proper information in regard to the loss, as to such matters as a mortgagee reasonably may be expected to know." We are of opinion that the plaintiffs in this case, in view of all the circumstances and conditions attending the fire, did all that the law required of them. See Parker v. Middlesex Mutual Assur. Co. 179 Mass. 528; Harnden v. Milwaukee Mechanics' Ins. Co. 164 Mass. 382; Cook v. North British & Mercantile Ins. Co. 183 Mass, 50; Bennett v. Ætna Ins. Co. 201 Mass. 554; Greenough v. Phænix Ins. Co. 206 Mass. 247.

Inasmuch as the claims of the plaintiffs that can be sustained are all for a loss on the property upon Arlington Street, Amory, the first mortgagee, is entitled to the whole amount of his debt and interest, under the mortgage, due at the time of the fire, to be assessed upon the three companies that issued policies on this property, in proportion to the amounts of their respective poli-The whole amount of his debt and interest on April 12, 1908, was \$3,711.10, and he is entitled to receive on account thereof \$2,226.66 from the Aachen and Munich Fire Insurance Company, \$742.22 from the German Fire Insurance Company and \$742.22 from the Farmers' Fire Insurance Company, with interest in each case from August 8, 1908, sixty days from the time when notice in writing of the fire was furnished to the company under the policy. The amount of the loss was payable at that time, and if the parties had not then agreed upon it, or had it determined, so that an action could be maintained for it, interest should be allowed on it from that date, when it is ascertained.

The amount of the loss on this property, as found by the referees, was \$5,000. The balance of \$1,288.90, after paying Amory, is to go to Watchmaker in part payment of his indebtedness sevol. 208.

cured by this mortgage. The amount of his indebtedness at the time of the fire was \$1,750 and interest from March 25, 1908. Assessing this balance of \$1,288.90 upon the three companies, in proportion to the amounts of their respective policies, he is entitled to recover from the Aachen and Munich Company \$773.34, from the German Company \$257.78 and from the Farmers' Company \$257.78, with interest in each case from August 8, 1908.

The judgments are set aside, and judgments for the defendants are ordered in the actions upon the policies covering the property on West Third Street. In the actions on the policies covering the property on Arlington Street, judgments for the plaintiffs are to be entered for the amounts stated in this opinion.

So ordered.

METROPOLITAN LIFE INSURANCE COMPANY vs. INSURANCE COMMISSIONER.

Suffolk. January 18, 1911. — March 7, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Insurance, Life, Accident, Industrial. Insurance Commissioner.

A foreign insurance corporation, with a capital stock of \$2,000,000 and a very large surplus, engaged since 1879 chiefly in the business of industrial insurance, namely, of the issuing of non-participating life insurance policies in suma of less than \$500 with a fixed premium payable in small instalments at short intervals, usually weekly, had made in its policies, in order to avoid fraudulent risks and to keep the expense of investigations duly proportional to the amount of the insurance, limitations that, if the insured died within a certain number of months of the issuance of the policy, nothing should be payable thereunder. In 1909 it proposed to issue a policy of industrial life insurance containing the following provision on the first page: "One half only of the above sum payable if death occur within six calendar months from date, and the full amount if death occur thereafter," and on the third page the following provision: "Accidental Death. In the event of the death of the insured from accident within six months from the date of this policy, the full amount of insurance named in the first schedule will be pald subject to the policy conditions." Held, that the provisions above quoted did not constitute accident insurance within the description contained in St. 1907, c. 576, § 32, cl. 5, and therefore that the life insurance policy which the corporation proposed to issue did not violate the requirement of § 84 that "contracts of insurance for each of the classes" specified in § 82 "shall be in separate and distinct policies."

Petition, filed in the Supreme Judicial Court on April 4, 1910, under St. 1907, c. 576, § 75, seeking a review of the action

of the insurance commissioner in determining that a certain form of insurance policy described in the opinion, which on April 13, 1909, it had submitted to the commissioner for his approval, did not comply with the requirements of that statute.

The case was heard by *Braley*, J., on the pleadings and an agreed statement of facts, and was reserved for determination by the full court.

The sections of the St. 1907, c. 576, which are material to a complete understanding of the decision, are as follows:

Section 32. "Ten or more persons residents of this commonwealth may form an insurance company for any one of the following purposes:

[Here follow twelve clauses, each clause specifying a certain kind of insurance, the fifth clause reading as follows:]

"Fifth, To insure any person against bodily injury or death by accident . . . and to make insurance upon the health of individuals."

Section 34. "No domestic insurance company shall transact any business other than that specified in its charter or agreement of association and no foreign insurance company admitted to this commonwealth prior to May thirty-first, eighteen hundred and eighty-seven, shall transact any other kind of business than it had been authorized to transact prior to that date, and no foreign insurance company admitted since said date shall transact more than one class or kind of business herein, except that a domestic company and, if its charter permits, and not otherwise, any admitted foreign company may transact: . . .

"e. The kind of business specified in the fifth clause if authorized to transact the business of life insurance in this commonwealth, provided it has a paid-up capital of not less than four hundred thousand dollars. . . .

"Contracts for insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance."

Section 75. "On and after January first, nineteen hundred and eight, no policy of life or endowment insurance shall be issued or delivered in this commonwealth until a copy of the form thereof has been filed at least thirty days with the insurance

commissioner; nor if the insurance commissioner notifies the company in writing within said thirty days that in his opinion the form of said policy does not comply with the requirements of the laws of this commonwealth, specifying his reasons for his opinion; provided that this action of the insurance commissioner shall be subject to review by the supreme court of this commonwealth; . . ."

The facts are stated in the opinion.

- G. W. Cox, for the petitioner.
- F. B. Greenhalge, Assistant Attorney General, for the respondent.

KNOWLTON, C. J. The petitioner brings its petition for a review of the decision of the insurance commissioner that a certain form of policy presented for his approval, under the St. 1907, c. 576, § 75, does not comply with the requirements of the law of this Commonwealth. The petitioner is a foreign life insurance company, having a capital stock of \$2,000,000, with a very large surplus, and it is engaged chiefly in the business of industrial insurance, that is, the issuing of non-participating policies of less than \$500 each, with a fixed premium payable in small instalments at short intervals, usually weekly. of policy proposed for use in this Commonwealth is the same that it uses in all other States, and it contains, on the first page, after a statement of the amount of the policy, this provision: "Onehalf only of the above sum payable if death occur within six calendar months from date, and the full amount if death occur thereafter." On the third page is this provision: "Accidental Death. In the event of the death of the insured from accident within six months from the date of this policy, the full amount of insurance named in the first schedule will be paid subject to the policy conditions."

Under the St. 1907, c. 576, § 34, contracts of insurance for each of the classes specified in § 32 shall be in separate and distinct policies. The question is whether the provision in the policy, which excepts death from accident within six months from the broader provision that limits the payment to one half the amount of the policy if death occurs within six calendar months, makes this accident insurance, within the fifth clause of § 32.

An ordinary life insurance policy includes the occurrence of death by accident as one of the conditions which call for a payment by the company, as well as death from any other cause, and ordinary accident policies include injuries by accident causing death, and to that extent they provide insurance of life. Yet neither of these two classes of policies is, for that reason, brought within the other class also.

It is agreed that, in all policies of this company issued from November 17, 1879, to September 15, 1887, there was a limitation as follows: "In the event of death within the first three months nothing is to be paid; one third only of the above sum payable, if death occur after three months and within six months; two thirds, if death occur after six months and within one year; and in event of death from any pulmonary disease within a year, one half of the foregoing amounts." In policies issued between September 15, 1887, and January 6, 1896, the limitation was that no benefit was to be paid if death occurred within three months, one fourth of the stated amount to be paid if death occurred after three months and within six months, and one half to be paid if death occurred after six months and within one year. In policies issued from January 6, 1896, to January 7, 1897, the limitation was one quarter of the stated amount of insurance to be paid if death occurred within six months, and one half to be paid if death occurred after six months and within one year.

The limitation in policies issued from January 7, 1907, to the time when the form of policy in question was filed was one half of the stated amount of insurance to be paid if death occurred within six months, and the whole amount to be paid if death occurred any time after six months. The reasons for these restrictions and limitations were and are twofold, namely, to keep out fraudulent risks, and at the same time keep the expense of investigations duly proportional to the amount of insurance, and to keep the amount of insurance paid always within a reasonable proportion to the premiums collected, in view of the fact that only one week's premium is paid in advance, whereas in ordinary insurance a year's premium in advance is always due.

It is obvious that the danger of fraudulent risks in insurance of this kind is greater than in some other kinds of life insurance,

and doubtless there were good reasons of policy for prescribing these limitations. On the other hand, there seems to be a good reason for excepting from the limitations cases of death by accident within six months. These provisions and methods seem to be properly incidental to the business of life insurance, in dealing with risks of this kind. Looking to the advancement of the business, and at the same time to a partial protection of the company from fraud, the company seems to have been justified in making this distinction between deaths from different causes. In issuing policies of this kind, the company is not doing a business of insurance against accident, except as all life insurance which includes death by accident is to that extent insurance against accident. It is not the giving of direct, affirmative benefits of a special kind on account of the accident. It is simply the exception of this class of cases from a limitation upon the ordinary rights of an insured person, which limitation was established for the prevention of fraud of a kind that has no relation to deaths by accident. In these particulars the case is very different from Ætna Life Ins. Co. v. Hardison, 199 Mass. 181. The provision is as if the limitation upon payments for deaths occurring within six months were expressed as applying to such deaths occurring from causes other than accident.

The taxation of this company is under the R. L. c. 14, § 28, and St. 1909, c. 490, Part III. § 30; that is, the company pays a percentage on the premiums collected and is not taxed on its reserve. No reserve is maintained on account of the exemption of this class of policies from the general provision as to deaths within six months, and no premium is charged on account of it. If the risk of such deaths were dealt with by itself, it would call for a slight addition to the premium, and for a reserve. But it is treated as a part of the general scheme of life insurance which calls for no separate computations.

We are of opinion that insurance in this form, under the circumstances shown in this case, is not accident insurance within the fifth clause of the St. 1907, c. 576, § 32, and that the delivery of policies of insurance within this Commonwealth in this form is not prohibited by law.

So ordered.

OLIVER W. MEAD vs. DAVID C. CUTLER & another.

Middlesex. January 27, 1911. — March 7, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Writ of Entry. Practice, Civil, Abatement, Writ of entry.

If, after the bringing of a writ of entry, the tenant surrenders possession of the land described in the writ and the demandant takes possession thereof, the writ abates and judgment must be entered for the tenant.

KNOWLTON, C. J. This is a writ of entry, brought in the Land Court * and taken by appeal to the Superior Court. It was agreed between the parties that the case should be heard before the presiding judge, without a jury, who should make rulings and direct answers to the issues, which answers should be treated as returned by a jury duly impanelled. Agreed facts were filed by the parties, and also "Memoranda upon which the case is to be submitted," duly signed. Two of the stipulations among those in the memoranda, are as follows:

"It is agreed, if competent, which the demandant denies, that the tenants quit the demanded premises on the 21st of March, 1908, and thereupon delivered the key of the house to the demandant who thereupon assumed possession thereof and has since held and claimed such possession.

"If said facts are competent and material, and the court shall rule as matter of law that thereby the demandant's writ has abated and the suit of demandant terminated, then such judgment is to be entered as such facts and ruling require."

The judge of the Superior Court found in favor of the tenant Estella A. Cutler, and against her husband, the tenant David C. Cutler.† One of this tenant's exceptions is to the

^{*} The date of the writ was October 17, 1905.

[†] The case was heard in the Superior Court by Schofield, J., on the question raised by the stipulations above quoted. He ruled "that the writ did not abate by the surrender of possession by the tenants on March 21, 1908, and the entry of the demandant. The estate of the demandant continued and he had a right to prosecute the action to judgment on the question of costs and of damages, and possibly also on his right to possession even if not entitled to execution for possession." The tenant David C. Cutler alone alleged exceptions.

ruling in favor of the demandant upon the question presented by these stipulations.

The object of a writ of entry is to obtain possession of real estate from a disseisor who is in possession and holds the demandant out. So it is elementary law that a person in possession of real estate cannot maintain a writ of entry without abandoning possession. Burns v. Lynde, 6 Allen, 805, 312. Sullivan v. Finnegan, 101 Mass. 447, 448. Allen v. Storer, 132 Mass. 372, 377. Leary v. Duff, 137 Mass. 147, 149. Russell v. Barstow, 144 Mass. 130. For this reason the St. of 1852, c. 312, § 52, now R. L. c. 182, §§ 1-4, was enacted to enable persons in possession to compel other persons claiming under an adverse title to bring an action to try the title. It is a corollary of this proposition that, if the demandant enters into possession, claiming the land, while the suit is pending, and keeps possession, the writ will abate. Roscoe on Real Actions, 204. Stearns on Real Actions, 215, 216. Jackson on Real Actions, 102, 142, 155, 156. Com. Dig. Abatement (H. 48), 135. Chief Justice Shaw recognizes this rule in Curtis v. Francis, 9 Cush. 427, 455. It has been reaffirmed from time to time in later cases. In Munroe v. Ward, 4 Allen, 150, 151, the court said: "But in order to maintain his action he must abandon the possession during the pendency of the action. For unless he does this, the tenant to the writ may plead, puis darrein continuance, that since the suit was pending he has entered upon the lands in question, and disseised the tenant. And if it appears that he has entered into the whole, or even a part, of the lands, the writ shall abate for the whole, provided it was an entry for the purpose of taking possession, and not a mere casual going upon the land." In Clouston v. Shearer, 99 Mass. 209, 212, we find this language: "Or if, while the suit was pending, the plaintiff should do any acts inconsistent with the pursuit of his remedy, such acts might be pleaded in abatement. Thus, if he were to enter and collect rents, or take the profits in any way, the defendant, as tenant in the action, might plead that he had entered and disseised him pending the suit. Entry into a parcel of the demanded premises would abate the whole writ." Our statutes in regard to writs of entry leave this rule of the common law unchanged. By the R. L. c. 179, § 8, "The law and practice relative to the pleadings and evidence in a writ of entry upon disseisin, as heretofore recognized and established," are continued in force, except so far as they are altered by the provisions of that chapter and of chapter one hundred seventy-three of the Revised Laws.

The stipulations of the parties, already quoted, do not seem to have reference to any question of pleading. This matter was pleaded definitely by one of the tenants and not by the other. The ruling of the presiding judge on this point was made without reference to the pleadings, and neither party has considered the pleadings in argument. We are therefore of opinion that the ruling "that the writ did not abate by the surrender of possession by the tenants on March 21, 1908, and the entry of the demandant" was erroneous, and that the exception on this point must be sustained. Under the second of the stipulations quoted above, this court having held as matter of law that the demandant's writ has abated and the suit of the demandant terminated, judgment should be entered for the tenant.

Exceptions sustained; judgment for the tenant.

The case was submitted on briefs.

A. A. Wyman, for the tenant David C. Cutler.

H. Parker & R. Walcott, for the demandant.

BENJAMIN F. KENNERSON vs. WILLARD G. NASH.

Suffolk. November 28, 1910. — March 9, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, & Sheldon, JJ.

Trust, Resulting. Equity Jurisdiction.

In a suit in equity to compel the defendant to convey to the plaintiff certain land which the defendant was alleged to have purchased with money of the plaintiff under an agreement that he should convey it to the plaintiff, it appeared that, for the purchase of the land, unincumbered, at a sale in foreclosure of a mortgage, the defendant had agreed orally to lend to the plaintiff \$1,000, which was the amount which was required to be paid at the time of the sale, and to purchase the land for the plaintiff and then to convey it to the plaintiff, who, by arrangement with the mortgagee, would give him a first mortgage back for the balance of the purchase price and then give to the defendant a second mortgage to secure the advance of the \$1,000 and certain other advances to be made by him and debts due from the plaintiff to him and others; that at the foreclosure

sale the defendant was the highest bidder and purchased the land for \$28,200, paid the \$1,000 required as an immediate payment, at a later date by arrangement with the mortgagee gave back a mortgage for \$28,000 to a nominee of the mortgagee for the remainder of the purchase price, and thereafter refused to carry out his oral agreement with the plaintiff. *Held*, that the suit must be dismissed, because the purchase price was not all paid by the plaintiff and therefore there was no resulting trust, and the statute of frauds prevented the enforcement of the oral agreement.

BILL IN EQUITY, filed in the Superior Court on October 28, 1898, and subsequently amended, seeking to establish a resulting trust in favor of the plaintiff in certain land which it was alleged the defendant purchased with the plaintiff's money.

The case was referred to Charles C. Barton, Esquire, as master. The substance of such of his findings as are material to the decision was as follows:

During the year 1897 the plaintiff became the owner in fee of the land in question. In November of that year, he began the erection thereon of two double apartment houses. On August 16, 1897, he mortgaged the premises to one Fallon to secure the payment of \$30,500, to be advanced to the plaintiff from time to time to pay off existing mortgages and to pay for labor and material in the construction of the buildings as the work progressed.

In June, 1898, the plaintiff was without further means to complete the buildings, and, as he could not obtain further advances from Fallon, he ceased work thereon. At this time the plaintiff had a large number of creditors to whom he was indebted for material and labor furnished in the construction of the buildings. Many of these creditors had placed attachments and liens on said premises.

The defendant was a dealer in building materials and, at the time the plaintiff ceased work upon the buildings, was a creditor of the plaintiff in the sum of \$3,324.86. The plaintiff also was indebted to one Nathan P. Gifford and George A. Gifford, lumber dealers and manufacturers of building finish, for about \$1,500. The Giffords declined to make any more advances to the plaintiff until some part of the plaintiff's indebtedness to them had been paid.

On July 18, 1898, Fallon began foreclosure of his mortgage by advertisement of a sale and by making an entry for the purpose

of foreclosure. The sale was advertised to take place on August 5, 1898, but afterwards was adjourned to August 19, 1898. At the sale a cash payment of \$1,000 was required to be made.

Nathan P. Gifford, being both willing and able to assist the plaintiff in the completion of the buildings, had a conversation with the plaintiff with that end in view. At that interview the plaintiff told Gifford that the defendant was a large creditor of his and had expressed a willingness to help him, and that the defendant might join with Gifford in helping him complete the buildings.

The manner of holding the title to the premises to protect the defendant and Gifford for the money advanced by him was gone over in interviews between the plaintiff, the defendant and Gifford. One plan was to have a trust deed given. The other plan was to have the foreclosure proceed. The defendant objected to a trust deed on the ground that all the creditors of the plaintiff might not be willing to join. The defendant suggested that the foreclosure proceedings be allowed to go on and the property sold, as by that means all attachments and liens would be cut off. It finally was agreed between the plaintiff and the defendant and Gifford, that the defendant and Gifford would advance, as a loan, to the plaintiff, the money to make the cash payment of \$1,000 required at the time of the foreclosure sale and to complete the buildings at an expense, according to estimates obtained, of about \$7,000; that the plaintiff should obtain some person, acting as a dummy, to bid off the property for him and thereafter give a new mortgage to Fallon, and also to give a second mortgage, subject to Fallon's mortgage, to the defendant and Gifford for the cash payment of \$1,000 required to be made at the mortgagee's sale and the \$7,000 required for the completion of the buildings and in addition thereto the amounts the plaintiff then owed the defendant and Gifford, with interest at six per cent per annum, and to hold the premises for the plaintiff subject to the mortgages until the plaintiff got a permanent mortgage, or paid the second mortgage, and then to convey the premises to the plaintiff. It was further agreed that the plaintiff should have general charge and superintendence of the buildings in accordance with the original plans. This agreement was not in writing. The plaintiff engaged one Marsh to

bid off the premises at the foreclosure sale, to give the mortgages and to hold the title for him, and on the day to which the mortgagee's sale had been adjourned went with Marsh to the office of the defendant and together with him they went to the premises.

Just before the sale began the defendant notified the plaintiff that he had made up his mind to bid in the premises himself for the plaintiff under the arrangement agreed upon, and that he did not wish to have Marsh bid on the property. The plaintiff, relying on the promise of the defendant that he would bid the property in under the arrangement previously made, directed Marsh not to bid at the sale. About twenty persons attended the sale and several bids were made. Two bids were made by creditors of the plaintiff. The defendant bid \$28,200, and, as he was the highest bidder, the auctioneer declared the premises sold to him. He thereupon paid down \$1,000 as required by the terms of sale. Gifford did not attend the sale on account of sickness. The defendant previously had agreed to represent him and to advance his part of the purchase money to be paid down in case he was unable to attend the sale. After the sale the defendant arranged with Fallon for a new mortgage to one Rice for \$28,000.

On August 24, 1898, Fallon gave a deed of the premises under the power of sale in the mortgage to the defendant, and on the same day the defendant gave back a mortgage on the premises on two months' time for \$28,000 to Rice. Rice and Fallon had a joint real estate account. The money lent on the mortgage given to Fallon and the money lent on the mortgage given to Rice came from this joint real estate account. The mortgage was given to Rice rather than to Fallon at the request of Fallon.

"Immediately after the sale the plaintiff told the defendant he would go with him to the defendant's office and have the deeds and other papers made in accordance with the agreements entered into previous to the sale. The defendant told the plaintiff he was too busy to attend to the matter on that day and requested the plaintiff to call the next day when he would attend to it. The plaintiff began to get bids for labor and materials and make arrangements for the completion of the buildings. On the day

after the sale, and from day to day thereafter, the plaintiff called on the defendant at his office and requested that the agreement made previous to the sale should be carried out, and that the deeds and other papers necessary to carry out the agreement should be executed and delivered. The defendant put the plaintiff off from day to day, for about ten days, and finally, when pressed by the plaintiff to execute the deeds and other papers, declined absolutely, and told the plaintiff he should keep the premises for himself. The defendant also told the plaintiff that he never intended to give the plaintiff any interest in the premises. The defendant has held the premises since the conveyance to him, and has taken the rents and profits thereof. He has refused to carry out his agreement with the plaintiff and Gifford."

A final decree in favor of the plaintiff was ordered by Wait, J.; and the defendant appealed.

A. G. Sleeper, for the defendant.

E. R. Anderson, (G. A. Sweetser with him,) for the plaintiff. LORING, J. When A., who has agreed by word of mouth to buy land as an agent for B., betrays his trust and buys it in his own name for his own account, the statute of frauds prevents B. maintaining a bill in equity to have A. decreed to hold the land for him, B. That is settled, at least in this Commonwealth. See Tourtillotte v. Tourtillotte, 205 Mass. 547, where the earlier cases are collected; in addition to those there cited see Hall v. First National Bank, 173 Mass. 16. The reasons of this rule and the effect of it are stated with accuracy in Bourke v. Callanan, 160 Mass. 195, 196, 197.

That in effect has been conceded by the plaintiff in the case at bar, and he has sought to escape from it by making out a resulting trust on the ground that in the case at bar the purchase money was paid by him. But the purchase money was not all paid by him. The purchase money was \$1,000 in cash paid on the day of the foreclosure sale (August 19), and a mortgage back for \$28,000 given on the day when the defendant received the deed pursuant to the foreclosure sale (August 24). The defendant had agreed to lend the plaintiff the \$1,000, and for that reason that sum in legal contemplation might be held to be his money within the doctrine of *Kendall* v. *Mann*, 11 Allen, 15,

acted upon in *McDonough* v. O'Niel, 118 Mass. 92. But the mortgage back was made by the defendant, and on the master's report it must be taken that the defendant alone signed the mortgage note. Where the purchase money is made up in part of cash furnished by the plaintiff (but not for an aliquot share) and in part of a mortgage back made by the defendant, there is no resulting trust in favor of the plaintiff. That was decided in *Dudley* v. *Dudley*, 176 Mass. 84, and *Olcott* v. *Bynum*, 17 Wall. 44. It was conceded in *McGowan* v. *McGowan*, 14 Gray, 119; and it was one of the grounds of the decision in *Bourke* v. *Callanan*, 160 Mass. 195.

The facts in McDonough v. O'Niel, 113 Mass. 92, were quite different from those in the case at bar and from those in the cases cited above of Dudley v. Dudley, McGowan v. McGowan, Olcott v. Bynum and Bourke v. Callanan. In the case of McDonough v. O'Niel, the purchase price was \$3,000. Fifteen hundred dollars of this was paid in cash lent to the plaintiff's testator, and the other \$1,500 was paid by a mortgage back made by the defendant to take the place of a mortgage for that amount which was on the land when it was bought by the plaintiff. It is stated in the opinion in McDonough v. O'Niel that Clements, who held the previous mortgage for \$1,500, "testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterwards did, in discharge of the old one," It is because of this fact that it was said in the subsequent cases of Bourke v. Callanan, 160 Mass. 195, 196, and Dudley v. Dudley, 176 Mass. 34, 37, that the purchase in McDonough v. O'Niel was the purchase of an equity of redemption. No such view however can be taken of the case at bar. The purchase in the case at bar was a purchase at which \$1,000 had to be paid in cash on the day of the sale. That means that the balance had to be paid in cash on delivery of the deed. And there is an express finding by the master in the case at bar that "after the sale the defendant arranged with said Fallon for a new mortgage to one Nehemiah W. Rice for twenty-eight thousand dollars (\$28,000)" which was the mortgage back. Not only that but under the original arrangement by which the

defendant agreed to lend the plaintiff the \$1,000 to be paid down on the day of the foreclosure sale the mortgage back was to be made not by the defendant for the benefit of the plaintiff but by the third person who was to be employed by the plaintiff to buy in the property for the benefit of the plaintiff and the defendant.

On the findings of the master the purchase here in question was a purchase of unincumbered land which the defendant carried through by paying \$1,000 which he had agreed to lend to the plaintiff and by giving on his own account a mortgage back for \$28,000. In such a case it is settled by the cases cited above that there is no resulting trust in favor of the plaintiff.

The entry must be

Bill dismissed.

GEORGE F. MANNING & another, executors, vs. EDGAR W. ANTHONY.

Norfolk. January 18, 1911. - March 9, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Frauds, Statute of. Practice, Civil, Ordering verdict.

An oral promise of the owner of an equity of redemption in real estate, which is subject to a mortgage made by his grantor, to pay the mortgage note within a certain time less than a year to its holder, who is the assignee of the mortgage, in consideration of such holder's forbearance from foreclosing the mortgage, is not a promise to answer for the debt, default or misdoings of another within the meaning of R. L. c. 74, § 1, cl. 2.

Where at the trial of an action of contract a special finding of the jury has established the facts alleged by the plaintiff, which make the defendant liable, and the amount of damages is not in dispute, it is proper for the presiding judge to order a verdict for the plaintiff under instructions which fix its amount.

CONTRACT by the executors of the will of Charles H. Hayden, upon an oral agreement alleged to have been made by the defendant to pay a certain mortgage note for \$5,000, dated August 4, 1900, signed by Warren D. Vinal and payable to Albert L. Jewell or order on August 4, 1902, with interest payable semi-annually at the rate of five per cent per annum, the note being secured by a mortgage on a lot of land with the buildings thereon

numbered 206 on Bay State Road in Boston, the plaintiffs' testator being the assignee of the note and the mortgage and the defendant being the purchaser of the equity of redemption in the mortgaged property. Writ dated April 7, 1906.

The declaration, as amended, contained four counts and alleged a promise of the defendant to pay the note in consideration of the forbearance of the plaintiffs for a reasonable time from instituting foreclosure proceedings upon the mortgage or taking action to enforce the payment of the note. The defendant's answer to the amended declaration, after a general denial, alleged that if the defendant made any such contract as was set forth in any count of the plaintiffs' declaration, the contract was a special promise to answer for the debt, default or misdoings of another, that such contract was not in writing, and that no memorandum or note thereof was made in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized, such as is required by R. L. c. 74; and further alleged that if the defendant made any such contract as was set forth in any count of the plaintiffs' declaration, the contract was an agreement which was not to be performed within one year from the making thereof, that such contract was not in writing, and that no memorandum or note thereof was made in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized, as required by R. L. c. 74.

In the Superior Court the case was tried before *Morton*, J. The judge ruled that the statute of frauds did not apply to the case, and the defendant excepted to this ruling. The judge submitted to the jury two special questions as follows:

"Has the plaintiff satisfied you by a fair preponderance of the evidence (1) that the contract was made as alleged in the decclaration and claimed by him to have been made, and (2) that he complied with the terms thereof?"

To each of these questions the jury answered "Yes."

The jury also brought in a general verdict for the plaintiff, which the judge set aside on the ground that it was improperly brought in. Thereupon a discussion took place between the judge and the counsel for the defendant, during which the counsel for the defendant said, "In the first place, the defendant

excepts to the ruling of the court that upon all the evidence—
or at least we ask a ruling that upon all the evidence in the
case there is nothing for the jury and a verdict should be ordered for the defendant. And we further ask the court now,—
a special verdict having been found, two questions having been
answered in favor of the plaintiff—upon the case as it stands,
that the court order that a verdict be returned for the plaintiff, and to that we except on the ground that on the basis of
the special verdict there is nothing else in the case. And on all
the evidence they are not entitled to recover." To this the
judge replied, "Those requests are refused and your exception
is noted."

At the end of the discussion the judge again submitted the case to the jury, instructing them as follows:

"I am going to submit some questions to you, and so you will take the case again for the purpose of answering these questions. You will have to determine the question under the declaration as to when the defendant agreed that that note should have been paid. Interest, of course, must be reckoned at the rate of the note up to the time that the defendant was under obligation to pay, and thereafter it is to be reckoned at the rate of six per cent. There are three counts in the declaration that you will have with you, and these are the questions that I am going to ask you to determine:

- "1. What was the date upon which the defendant agreed to pay the note?
- "Not the date of the agreement. The agreement was that the defendant should pay the note at some time. What was that time?
- "(a) Was it during the month of September, 1902, as alleged in the second count of the amended declaration?
- "(b) Was it within a reasonable time from the date of the agreement, as alleged in the fourth count of the declaration, or
- "(c) Was the time of payment left undetermined, as alleged in count three of the declaration?
- "When you have answered that question as to the date you will have to determine interest, calculate interest from that date. This paper you will have with you. This you will remember; it is very simple.

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"If the jury find that the date at which the defendant agreed to pay the note was September, 1902, they will reckon interest from that date at six per cent to the present date, crediting all payments of interest subsequent thereto, and find for the plaintiff for \$5,000 and the amount of interest thus arrived at.

"If the jury find that the date at which the defendant agreed to pay the note was to be within a reasonable time after the promise was made, the jury are to determine when said reasonable time expired and compute interest therefrom, crediting the payments of interest, if any, and return a verdict for the plaintiff for \$5,000 with interest so computed.

"If the jury find that the time of payment was left undetermined no interest is to be calculated.

"You will retire and answer those questions. You will make your verdict in accordance with the directions I have just given you. Fix the time. When you fix that time, calculate interest, giving credit for any payment of interest. For instance, there was a payment on it. There is no question about that. If you find September, 1902, was the date upon which the defendant was under obligation to pay the note you will calculate your interest at six per cent. from that time, and you have got to credit the payment of \$125 which was made."

To the foregoing instructions the defendant excepted.

To the question, "What was the date upon which the defendant agreed to pay the note?" the jury answered, "September 13, 1902."

The jury returned a verdict for the plaintiff in the following form: "The jury find for the plaintiff and assess damages in the sum of \$5,000 with interest at five per cent from August 4, 1902, to September 13, 1902, \$27.40 and interest at six per cent from September 13, 1902, to May 11, 1910, \$2,298.33. Total interest, \$2,325.73, less \$125 paid February 17, 1903. Balance interest due \$2,200.73." The defendant alleged exceptions.

S. L. Whipple, for the defendant.

J. W. Farley, (J. W. Spring with him,) for the plaintiffs.

BRALEY, J. The evidence warranted the special findings of the jury, that the defendant agreed to pay the overdue mortgage note if the plaintiff would not foreclose, and that in reliance upon the promise foreclosure proceedings were not instituted.

The title to the equity of redemption stood in the defendant's name, but the note and mortgage having been given by his grantor, the principal defense is, that, if the promise was collateral, no sufficient memorandum in writing was ever given, or if original, the agreement was not to be performed within one year from its date, and the action, therefore, is barred by R. L. c. 74, § 1, cl. 2, 5. The last contention, if it were not disposed of by the very terms of the agreement, is settled by the third special finding of the jury, that the period of performance was understood to be less than the statutory time. Roberts v. Rockbottom Co. 7 Met. 46. If a special promise to answer for the debt of another must be evidenced by a memorandum or note in writing signed by the party to be charged, even if the consideration expressed therein may be shown by extrinsic evidence, the testimony is plenary, that the defendant's controlling motive was to prevent a foreclosure for his own benefit, or, as he testified, to protect the interests of the corporation with which he was connected, although neither could have been compelled by suit to pay the note of the mortgagor. Ames v. Foster, 106 Mass. 400. Carleton v. Floyd, Rounds & Co. 192 Mass. 204. R. L. Bogigian v. Booklovers Library, 193 Mass. 444. c. 74, § 2. The defendant's promise, as the jury specially found, was to pay a debt for which the property could have been held, and, the plaintiffs' forbearance to press the right of foreclosure having been a sufficient consideration to support the promise, the ruling that the contract was independent of the statute was right. Mackin v. Dwyer, 205 Mass. 472, 475, and cases cited. Fish v. Thomas, 5 Gray, 45. Fears v. Story, 131 Mass. 47. Stratton v. Hill, 134 Mass. 27, 30. Paul v. Wilbur, 189 Mass. 48, 52.

The defendant's evidence having tended to prove that he acted or intended to act in a representative capacity, he contends that this question should have been submitted to the jury, and that the judge erred in directing a general verdict for the plaintiffs upon the special findings. It is clear from the record that the request was not made until after the return of the special findings under the first two questions. But, the defendant not having called to his attention the question of agency, the judge evidently understood when the testimony closed, and so stated to the jury, that the only matter of law the defendant

intended to raise was that which we have discussed. If the defendant desired to present this question he should have asked for a ruling before the judge instructed the jury. It came too late as a matter of right after the special findings had been submitted and answered. Keohane, petitioner, 179 Mass. 69. Bu the general verdict simultaneously returned was at once set aside by the judge on his own motion without any objection being made by the parties, as no instructions had been given in reference to the amount which the plaintiffs were entitled to recover. A general verdict, however, was necessary at some stage of the proceedings, and the defendant then for the first time asked the judge to rule, that upon all the evidence in the case there was nothing for the jury and that a verdict should be ordered for the defendant, and that, if the defendant promised as the jury had found, a verdict for the plaintiffs could not be ordered. The judge properly could have refused, as we have said, to entertain this request. But he did not take this course. His final reply after a long colloquy with the counsel for the defendant, that his requests were refused, and "your exceptions noted" saved the point now pressed. The jury then were instructed further to find the time when performance was due from the defendant, and also as to the amount of their verdict, which the judge ordered for the plaintiffs.

But the exceptions, although open, cannot be sustained. The ruling that the agreement, if either entirely oral or evidenced by the letters which passed between the parties, was an original and not a collateral contract, left the question of fact to be determined whether the defendant's promise was unconditional and absolute, as the plaintiffs contended, or whether, as the defendant testified, it was conditional upon a sale of the property which he was trying to arrange but which he did not complete because, as he notified the plaintiffs, his efforts to sell had not been successful. The request that a verdict be ordered for the defendant was rightly refused, and under instructions to which no exceptions were taken to the omission to refer to any question of agency, the jury were correctly instructed, "that an agreement of some sort was made there is no question. What the agreement was is the issue here." By their special findings the jury decided that the defendant's promise was his own unqualified undertaking to pay the debt as the plaintiffs alleged. It followed that no further question of fact as to the defendant's liability remained to be proved, and, the amount not having been in dispute, the judge properly ordered a verdict for the plaintiffs. Raymond v. Crown & Eagle Mills, 2 Met. 819. Winsor v. Griggs, 5 Cush. 210. Welch v. Goodwin, 128 Mass. 71. Doucette v. Baldwin, 194 Mass. 181, 185.

Exceptions overruled.

DELANA E. BISHOP, Petitioner.

Middlesex. March 9, 1911. — March 14, 1911.

Present: Knowlton, C. J., Hammond, Bralky, Sheldon, & Rugg, JJ.

Practice, Civil, Exceptions, petition to establish. Rules of Court.

Proceedings to establish the truth of exceptions are treated as strictissimi juris.

A petition to establish the truth of exceptions cannot be amended by adding to it allegations which are not supported by an affidavit made within twenty days after notice of the refusal to allow the bill of exceptions, as required by Rule 6 of the rules for the regulation of practice before this court.

If upon the face of a petition to establish the truth of exceptions it appears that the exceptions sought to be proved are plainly frivolous and immaterial, the petition should be dismissed without an inquiry into the truth of its allegations; but it is only when the immateriality is obvious that the petition can be dismissed on this ground. Where the petitioner presents questions proper for argument and for deliberate consideration by this court, they will not be disposed of without giving the petitioner an opportunity to establish the truth of the exceptions which he has alleged and to argue them if they are established.

Where upon the face of a petition to establish the truth of exceptions it appeared that the petitioner's requests for rulings raised only questions of fact upon which the petitioner had the burden of proof, and that the evidence on these questions was conflicting, and that the only other exception alleged to which the petition related was to the admission in evidence of a certain sentence in a letter, written by a man who had testified as a witness for the petitioner, and whose testimony the sentence in the letter tended plainly to contradict in a material matter, it was held, that the petition should be dismissed on the ground that, if the exceptions alleged by the petitioner were established, they would present no questions of law of sufficient gravity to call for consideration by this court.

PETITION to establish the truth of exceptions alleged to have been taken by the petitioner as libeliee at a hearing before Sanderson, J., upon objections filed by her to making absolute a decree nisi of divorce for adultery which had been entered against her. It was alleged in the petition that on January 11, 1911, Sanderson, J., refused to sign and allow the bill of exceptions presented by the petitioner, and that notice of such disallowance was given to the petitioner on January 23, 1911.

The petitioner presented to this court a motion to amend her petition by adding an allegation that on the day on which the petitioner filed her bill of exceptions she "delivered to the attorneys for the respondent a written notice of the filing of said bill of exceptions, together with a copy thereof," and also by adding to the statement of a certain objection alleged to have been made by the petitioner an allegation that "the court overruled the objection and the libellee excepted."

The libellant filed in this court a motion to dismiss the petition for the following reasons:

- "First. It does not appear in said petition that any notice of the filing of the bill of exceptions was given to the adverse party.
- "Second. It does not appear in said petition that the parties were heard by the presiding justice as to the said bill of exceptions.
- "Third. It does not appear in said petition that the petitioner ever attempted to have said bill of exceptions allowed.
- "Fourth. An examination of the bill of exceptions annexed to the petition shows that no error of law was committed by the presiding judge, and that the petitioner would have no substantial exception if said exceptions shall be proved."
 - W. S. Patterson, for the petitioner.
 - T. W. Proctor, for the respondent.

Knowlton, C. J. The petitioner has filed a motion to amend her petition by adding to it certain allegations. These allegations are not supported by affidavit, as is required by Rule 6 of the rules for the regulation of practice before the full court.

We feel bound by the decision in *Tufts* v. *Newton*, 117 Mass. 68, in which it is held that an affidavit in a case of this kind, made after the expiration of twenty days from notice of the refusal to allow the bill of exceptions, cannot be effectual to entitle the party to the benefit of such allegations. It is decided that proceedings to establish the truth of exceptions are *strictis*-

simi juris, and the motion to amend the petition at this time must be denied. See also Hadley v. Watson, 143 Mass. 27.

The respondent asks us to dismiss the petition for the reason. among others, "that an examination of the bill of exceptions annexed to the petition shows that no error of law was committed by the presiding judge and that the petitioner would have no substantial exception if said exceptions shall be proved." In Fitch v. Jefferson, 175 Mass. 56, Chief Justice Holmes said in the opinion: "As a general rule no inquiry into the merits of a bill of exceptions is open upon a petition to prove them. Ordinarily it is not proper to call upon the court to pass upon a question of law until that question is proved to have arisen in the proceedings sought to be revised. But while it appears to us better to adhere to the rule pretty strictly, the rule is rather one of convenience and propriety than of absolute law. It is perfectly logical to dismiss a petition to prove exceptions on the ground that there is nothing in them if they are proved." In that case the petition to establish the truth of exceptions was dismissed after a consideration of the merits of the exceptions.

We are of opinion that if it appears upon the face of a petition to establish exceptions, that the exceptions sought to be proved are plainly frivolous and immaterial, so as not to be a proper subject for judicial inquiry, the petition should be dismissed. It would be idle to put a prevailing party to the delay. trouble and expense of a hearing before a commissioner and subsequent proceedings in court, if it were obvious upon a cursory examination of the case of an excepting party that there were no material questions of law involved in it. On the other hand, if the petitioner presents questions proper for argument and deliberate consideration by the court, they will not be disposed of without giving the petitioner an opportunity to establish his exceptions and to argue them if they are established. Ordinarily, upon such a petition, the court will not inquire into the merits of the exceptions. It is only when the immateriality is obvious that the petition can be dismissed.

In the present case the libellee's requests for rulings raised only questions of fact upon which she had the burden of proof, and the evidence was conflicting. Plainly no debatable question of law was raised by the refusal of them. The only other alleged exception to which the petition relates is to the admission of a sentence contained in a letter received by the libeliee from a man with whom she was charged with having committed adultery, as follows: "You are not my wife, but you are just the same." The libeliee relied upon his testimony that they had never seen each other but once and that their relations were innocent. It is too plain for question that this statement was admissible as tending to contradict him.

We are of opinion that the petition should be dismissed on the ground that, if the exceptions were established, they would present no questions of law of such gravity as properly to call for consideration by the court.

Petition dismissed.

CHARLES W. CHANDLER vs. JOHN P. SQUIRE AND COMPANY.

Suffolk. December 8, 1910. — April 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Negligence.

In an action for personal injuries alleged to have been caused by the negligence of the servants of the defendant, it appeared that the plaintiff, together with a helper, was sent by his employer to take out an old metal shaft in the place of business of the defendant and to install a new one in its stead, that when the plaintiff was engaged in taking out the old shaft, which weighed eight hundred pounds, there were present five or six workmen of the defendant, including a man who was described as a foreman of the machine shop, and it could have been found that they were there by the direction or authority of the defendant, that the shaft ran through a hole in a brick wall between the main building and a shed, and, having been detached, had dropped down upon the brick which formed the lower part of the hole in the wall, that in the course of the work it became necessary to tip down the end of the shaft in the main building, that for this purpose one of the defendant's men gave the order "Now bear down on it," that the plaintiff, who was in the shed with one of the defendant's workmen, did not hear this order, that the plaintiff's helper, who was in the main building with the rest of the defendant's workmen and their foreman and wanted to get out of the way before the shaft was tipped, said "Hold on a minute," that the plaintiff heard him and answered "All right. Here, take this light," and stooped down and passed a light through the hole, that the defendant's men, who it did not appear had heard anything said by the plaintiff, bore down on the shaft as they had been told to do, and that the shaft struck the plaintiff under the arm and forced his arm back against the brick wall, causing the injuries sued for. There was nothing to show that the defendant's men were to wait for an order from the plaintiff before bearing down on the end of the shaft in the main

building. Held, that there was no evidence of negligence on the part of the defendant's servants, who in bearing down upon the shaft did only what they were expected to do, there being nothing to show that when the order to bear down was given either he who gave it or those who obeyed it had any reason to anticipate that the plaintiff would put his arm through the hole as he did.

TORT for personal injuries sustained on March 9, 1907, in the manner described in the opinion, when the plaintiff was in the employ of James H. Roberts and Company and had been sent to take out a shaft in the place of business of the defendant at East Cambridge. Writ dated May 16, 1907.

In the Superior Court the case was tried before White, J. The plaintiff at the trial waived all but the first count of his declaration, which alleged that the plaintiff while in the exercise of due care was injured by reason of the negligence of the defendant's servants and agents in causing the shaft to strike him with great force and violence. At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the defendant, and reported the case for determination by this court, with the stipulation of the parties which is stated in the opinion.

J. J. Scott, for the plaintiff.

W. H. Hitchcock, (C. M. Pratt with him,) for the defendant.

MORTON, J. The plaintiff's employers, James H. Roberts and Company, contracted with the defendant to take down an old shaft in the defendant's place of business and put up a new one with a new coupling and fit the old coupling to the other end of the new shaft. The defendant agreed to pay \$80 for the job and to do the necessary teaming. There was nothing in the contract which required it to furnish any labor or appliances. The work was to be done between Saturday night and Monday morning. The plaintiff received instructions from his superior, and the day before beginning on the work he went to the defendant's place of business and looked the situation over. next day he went there with a helper who was in the employ of Roberts and Company, and while engaged in taking down the old shaft received the injuries complained of. At the close of the plaintiff's evidence the judge directed a verdict for the defendant and reported the case to this court, the parties agreeing that if the ruling was right judgment should be entered on the verdict, otherwise for the plaintiff for \$400 and costs.

The shaft to be taken down was about ten feet long and weighed about eight hundred pounds. It ran through a hole in a brick wall and was partly in what is called the main building and partly in a shed. It was connected by a flange coupling in the main building and a clutch coupling in the shed. Five or six of the defendant's men were there, including a man who was described as the foreman of the machine shop. There was also a chain fall belonging to the defendant. It did not appear just how the men came to be there, but we think that it could have been found that they were there by the direction or authority of the defendant. Previously to beginning the work a hole had been bored into the floor overhead in the main building, by one of the defendant's men, to put an eyebolt in for the chain fall. The plaintiff disconnected the shaft in the main building and the chain fall was used to hold up that end of the shaft. The plaintiff then went into the shed with one of the defendant's men and proceeded to pry apart the clutch coupling. When the shaft was detached it dropped down on to the brick which formed the lower part of the hole in the wall. The helper who came with the plaintiff remained in the main building with the other men of the defendant and the foreman. In the course of the work it became necessary to tip down the end of the shaft in the main building. As the shaft dropped down on to the brick on the lower side of the hole, after it was detached, the plaintiff testified that he "heard some one say on the other side, Hold on a minute," and he said, "All right. Here, take the light," and "stooped down and passed the light through the hole, ... just as I reached through that shaft came up all of a sudden, struck me right under the arm, forced my arm back up against the brick wall." He testified that he heard no one say anything about bearing or pressing down on the shaft. There was testimony tending to show that the words "Hold on a minute" were spoken by the plaintiff's helper who was on the other side of the wall and was the nearest of those on that side of the wall to the plaintiff; and that they were spoken by him not to the plaintiff but to Squire's men, one of whom had given the order "Now bear down on it" [the shaft] and because he, the helper, was in a place of danger from which he wished to get out. The accident happened in

consequence of the defendant's men bearing down on the shaft pursuant to the order aforesaid. The helper testified that he did not hear anything said by the plaintiff about a light, but the evidence would warrant a finding in regard to that matter, if material, in favor of the plaintiff. There was nothing to show that, if anything was said by the plaintiff, it was said so that it could be or was heard by the men at the end of the shaft, or that it was meant to be heard by them. In bearing down upon the shaft the men did only what they were expected to do, and there was nothing to show that when the order was given to bear down either the one who gave it or those who obeyed it had any reason to anticipate that the plaintiff would put his arm through the hole in the wall as he did. Nor was there anything to show that the defendant's men were to wait until ordered to do so by the plaintiff before they bore down on the end of the shaft in the main building. We do not see therefore how it can be said that there was any evidence of negligence on the part of the defendant's servants or agents, even if we assume in the plaintiff's favor, but without so deciding, that if there had been the defendant would have been liable therefor.

In accordance with the agreement the entry must be Judgment on the verdict for the defendant.

GRACE M. TIMBERLAKE & another vs. SUPREME COMMAND-ERY, UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD.

Suffolk. January 11, 1911. — April 8, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Res Judicata. Judgment. Practice, Civil, Findings of trial judge, Parties. Corporation, Ultra vires. Estoppel. Fraternal Beneficiary Corporation.

In a suit in equity in another State, seeking to annul as ultra vires a consolidation between a fraternal beneficiary corporation in such other State and a Massachusetts fraternal beneficiary corporation, in which the Massachusetts corporation was named as a defendant but never has been served with process except by publication under the statutes of such other State and never has appeared in the suit, if a decree pro confesso is entered against the Massachusetts corporation

in the court of the other State, the rights of the Massachusetts corporation are in no way affected by such decree; and therefore the beneficiaries named in a benefit certificate, issued by the Massachusetts corporation to one of its members, who were not parties to the suit in the other State, are in no way bound by any decision or decree made in that suit, even if they would have been sufficiently represented by the Massachusetts corporation to be bound by such a decree in case that corporation had become subject to or voluntarily had submitted itself to the jurisdiction of the court of the other State.

On an appeal from a judgment entered by order of a judge to whom the case was submitted, without a jury, upon an agreed statement of facts with power to draw inferences from the facts stated, the question before this court is whether, upon the facts stated and any inferences which the trial judge was warranted in drawing therefrom, his findings were warranted.

If a fraternal beneficiary corporation, organized under the laws of another State, undertakes to assume the obligations of a death certificate issued by a Massachusetts fraternal beneficiary corporation, and the member insured by such certificate, accepting the offer of the foreign corporation, joins a body organized as one of its subordinate commanderies and for a period of two years pays assessments to the foreign corporation for the insurance purporting to be given by the terms of his certificate, believing himself to be entitled to all the privileges of a member of the foreign corporation, that corporation, after the death of the member, in an action brought against it by the beneficiaries named in the certificate to enforce its promise, cannot defend the action on the ground that its promise to assume the obligation of the Massachusetts corporation which issued the certificate was ultra vives and that the insured to whom the certificate was issued never performed the formal acts required for becoming a member of the foreign corporation.

The beneficiary of a death benefit named in a certificate issued to a member of a fraternal beneficiary corporation incorporated under R. L. c. 119 can sue the corporation in his own name upon the contract made with the deceased member under whom he claims, and in like manner he can sue in his own name a corporation which has assumed toward the plaintiff the obligations of such fraternal beneficiary corporation upon such certificate.

CONTRACT by the daughters of Mary A. Timberlake, late of Boston, as the beneficiaries named in a benefit certificate issued by the Supreme Commandery of the Home Circle, a Massachusetts fraternal beneficiary corporation, the obligations of which upon the certificate issued to Mary A. Timberlake were alleged to have been assumed by the defendant, a fraternal beneficiary corporation organized under the laws of the State of Tennessee. Writ dated October 19, 1908.

In the Superior Court the case was submitted to Sanderson, J., without a jury, upon an agreed statement of facts, which in substance was as follows:

On November 27, 1888, the Supreme Council of the Home Circle admitted Mary A. Timberlake to membership in that

order and issued to her its benefit certificate of insurance, numbered 6538, by which, in consideration of compliance by Mary A. Timberlake with certain laws, rules and regulations adopted to govern the Supreme Council, the Supreme Council of the Home Circle promised to pay to the plaintiffs upon the death of Mary A. Timberlake the sum of \$2,000.

After November 27, 1888, and until August 1, 1906, Mary A. Timberlake continued to be a member in good standing of the order of the Home Circle, having paid all dues and assessments required by her to be paid under the laws, rules and regulations of that order, and having otherwise complied with the laws, rules and regulations of the order, and having done all things required by the laws, rules and regulations of the order to keep the certificate in full force and effect.

The defendant is a fraternal beneficiary corporation, organized under the laws of the State of Tennessee. It was on January 1, 1906, and ever since has continued to be, authorized according to law to do business as a fraternal beneficiary corporation within this Commonwealth, to the extent permitted by its charter and by the laws of the Commonwealth.

On or about March 6, 1906, negotiations were begun between the executive committees of the Supreme Council of the Home Circle and of the defendant, looking toward the conclusion of an agreement of the nature hereinafter described.

On or about April 12, 1906, the executive committees of the two orders formulated an agreement to be submitted to the two orders. Among others, this formulated agreement contained the following provisions:

"First. The Golden Cross will accept to full membership in its society all members of the Home Circle in good standing at date of merger, without medical examination."

"Third. Members of the Home Circle thus merged with the Golden Cross will continue to pay their assessment rate in force in the Home Circle at date of merger until the close of December 31, 1906. Thereafter, commencing January 1, 1907, they will pay the rates prescribed for their attained ages by the Golden Cross table of rates."

"Fifth. It is expressly provided that the Golden Cross shall not be liable for the payment of sums named in any certificate

issued by the Home Circle in excess of \$2,000 after the member to whom such benefit certificate was issued has reached the age of fifty-five years, as provided by the Constitution and laws of the Home Circle, and provided also that contracts relating to outstanding releases given by members to the Home Circle shall be modified as stipulated in either clause six or twelve of this agreement, as the member may elect.

"In all other respects, the contracts, agreements, and promises, made by and between members of the Home Circle and its Supreme Council, in force at the date when the Home Circle merges with the Golden Cross, shall thereafter be of binding force and effect in the Golden Cross."

"Seventh. The assets of the Supreme Council of the Home Circle will be transferred to and its obligations will be assumed by the Supreme Commandery of the Golden Cross."

"Eleventh. On August 1, 1906, unless found impracticable or refused by one of the societies, the merger shall take effect, and thereafter the assessments of the Home Circle members shall be paid to the Supreme Commandery of the Golden Cross, unless its Executive Committee should, for a limited period, entrust the collection of assessments to the office of the Supreme Secretary, Home Circle."

On or about May 15, 1906, the Supreme Executive Committee of the defendant mailed a printed notice to all the members of the United Order of the Golden Cross to meet to consider the preliminary agreement for transfer or reinsurance of the certificate holders of the Home Circle. On June 21, 1906, a meeting of the members and certificate holders of the Golden Cross was held, in accordance with the terms of the above-mentioned notice, at which meeting it was voted, by vote of more than two-thirds of the certificate holders present or represented by lawful proxy, to accept the agreement of transfer or reinsurance of certificate holders of the Home Circle to or in the United Order of the Golden Cross. A certified copy of that agreement was filed with the Insurance Commissioner of this Commonwealth on July 23, 1906.

On June 6, 1906, due notice having been given, a meeting was held of the certificate holders of the Supreme Council of the Home Circle, of which Mary A. Timberlake was one, and

the agreement was accepted by a unanimous vote of the members present and voting.

On May 21, 1907, the following resolution was adopted by the Supreme Commandery of the United Order of the Golden Cross of the World by a vote of forty-three to four:

"Be it resolved: By the Supreme Commandery of the United Order of the Golden Cross of the World, in legislative session assembled at the Exposition Grounds, Jamestown, Virginia, May 21, 1907. That the action of the Supreme Commandery in executive session at Knoxville, Tennessee, on May 15, 1906, and of the general meeting of the members and certificate holders of this order taken and had at Berkeley Hall, Boston, Mass., on Thursday, June 21, 1906, whereby they ratified and confirmed and adopted the contract of April 12, 1906, made between the Executive Committees of the Supreme Council of the Home Circle and the Supreme Commandery of the United Order of the Golden Cross of the World providing for a merger of the two orders by the same is hereby in all things approved, ratified and confirmed."

On or about August 1, 1906, the subordinate councils of the Home Circle, including the council of which Mary A. Timberlake was a member, were organized as subordinate commanderies of the Golden Cross, with the same subordinate officers in charge thereof. Assessments were paid by the members, including Mary A. Timberlake, of these subordinate councils or commanderies to the proper subordinate officers of the councils or commanderies, and were paid over by them to the supreme treasurer of the United Order of the Golden Cross. The money so paid over to the supreme treasurer of the Golden Cross was not mingled with the assessments received from the Golden Cross Commanderies, was kept separate and was used solely for the payment of death benefits accruing on certificates originally issued by the Home Circle. Mary A. Timberlake, after August 1, 1906, and up to the time of her death, paid assessments to the subordinate officer of the council or commandery of which she was and had been a member.

After January 1, 1907, and until the date of her death, Mary A. Timberlake paid all such assessments as were demanded by notices sent from the office of the supreme secretary of the de-

fendant order, and such assessments were paid in accordance with the table of rates adopted by the defendant.

Mary A. Timberlake died on July 14, 1908, having paid all assessments which, up to that time, properly ought to have been paid, and having done all things required of her to be done in order to keep the benefit certificate and her rights, if any, or those of the plaintiffs, against the defendant, and the plaintiffs have done all things by them required to be done in order to keep the benefit certificate and their rights, if any, against the defendant. Due and sufficient proofs of her death were mailed to the officers of her subordinate council or commandery, and forwarded to the supreme secretary of the defendant order.

On or about November 6, 1906, Charles Knapp and others, members of the United Order of the Golden Cross of the World, filed a bill in equity against the Supreme Commandery of the United Order of the Golden Cross of the World in the Chancery Court of Knox County, Tennessee. The Chancery Court of Knox County, Tennessee, is a court of equity having jurisdiction of the United Order of the Golden Cross in that cause and having power to issue valid and binding decrees such as were issued in that cause. Due service of process was made on the defendant, the United Order of the Golden Cross, which appeared and defended the cause. The Supreme Council of the Home Circle was named as a party defendant in the bill and judgment was entered against it pro confesso by order of the Chancery Court but service was made upon it only by publication in accordance with the provisions of the statutes of the State of Tennessee. The Home Circle did not appear in the Chancery Court until its receiver intervened as hereinafter set forth.

The object of the bill in equity was to have the above mentioned agreement between the two fraternal orders declared ultra vires, null and void.

On November 13, 1906, an injunction as prayed for in the bill was issued against the defendant by the Chancery Court of Knox County, Tennessee. On November 19, 1906, an order modifying the injunction was issued by that court. On December 18, 1906, the defendant filed an answer in that case. The defendant was represented by able counsel, members of the bar of Tennessee, and the case was defended and tried in good faith

through all its stages by the Supreme Commandery of the United Order of the Golden Cross.

On July 6, 1907, an order was issued in the case, modifying the injunction so as to allow the defendant to pay death claims of members of the Home Circle out of funds collected from Home Circle members in the manner set forth in the order, and on April 14, 1908, a final decree was entered, sustaining the allegations in the bill, ordering an accounting and a winding up of the business done by the attempted merger, and forbidding by a perpetual injunction the merger of the two fraternal orders. The case was taken to the Supreme Court of Chancery of the State of Tennessee, on appeal of the Supreme Commandery of the United Order of the Golden Cross, and the appeal was argued fully and in good faith by counsel for the United Order of the Golden Cross, the defendant. On or about December 6, 1908, the Supreme Court of Tennessee rendered an opinion, and a decree was entered in the Supreme Court of the State of Tennessee, sustaining the findings and decrees of the Chancery Court of Knox County.

The defendant has in all respects observed and carried out the orders and decrees of the courts of Tennessee, made and entered in the case of Charles Knapp et al. against the defend-All the funds received by the defendant order from persons who were former members of the Home Circle, and who were to be made members of the United Order of the Golden Cross by the attempted merger or consolidation, have been paid out and used in good faith in paying death claims of Home Circle members, and none of the funds received by the defendant from the former Home Circle members have been mingled with the benefit fund or other funds of the United Order of the Golden Cross. All the funds received from former Home Circle members since the equity suit was brought by Charles Knapp and others against the defendant have been paid out and used under the directions and orders of the Chancery Court of Knox County, Tennessee.

The matter of an accounting between the two fraternal orders is still pending before the Chancery Court of Knox County, Tennessee.

If competent and material, it was agreed that on or about VOL. 208. 27

December 18, 1908, a bill in equity was brought by the Attorney General of the Commonwealth of Massachusetts in the Supreme Judicial Court of Suffolk County, Massachusetts, asking for a winding up of the business of the Home Circle and the appointment of a receiver, and on December 28, 1908, Robert W. Sawyer, Jr., was appointed receiver of the Home Circle by the Supreme Judicial Court, and the receiver has been made a party to the original suit of Charles Knapp et al. against the United Order of the Golden Cross of the World and the Home Circle, in the Chancery Court of Knox County, Tennessee, and the receiver has intervened in that suit in the matter of the accounting between the two orders.

The defendant and its officers, agents and counsel, and the officers, agents and members of the Home Circle have been in the exercise of good faith throughout the attempted merger and in all proceedings subsequent thereto.

It was agreed that the constitution, charter and general laws of the United Order of the Golden Cross as revised at the session of the Supreme Commandery held at Providence, Rhode Island, in May, 1905, might be regarded as a part of the facts agreed, and so far as competent and material, might be referred to by counsel for either party.

It also was agreed that all of the copies of papers mentioned might be regarded as evidence, and as a part of the agreed statement.

It further was agreed that the court might draw all proper inferences from the facts above stated.

The judge found for the plaintiffs in the sum of \$2,270; and made an order for judgment in that amount. From the judgment entered in pursuance of this order the defendant appealed.

W. H. Powers, (W. Powers with him,) for the defendant.

H. L. Brown, (E. Field with him,) for the plaintiffs.

SHELDON, J. The plaintiffs were not parties or privies to the action brought by Knapp and others against the defendant in Tennessee, and are in no way bound by the decision made therein. Rothrock v. Dwelling-House Ins. Co. 161 Mass. 423. Pennoyer v. Neff, 95 U. S. 714. We need not consider whether, if the Supreme Order of the Home Circle (hereinafter called simply the Home Circle) had become subject to the jurisdiction

of the Tennessee courts either by having been properly served upon or by having voluntarily entered its appearance in the case, it could be held that Mrs. Timberlake, under whom the plaintiffs claim, was sufficiently represented by that corporation, of which she had been a member. This would require some extension of the doctrine declared in such cases as Francis v. Hazlett, 192 Mass. 137, and Howarth v. Lombard, 175 Mass. 570, in which it was held that under the circumstances there stated the domestic stockholders of an insolvent foreign corporation were bound by the action of the foreign courts in suits to which the corporation was a party. Here the Home Circle, though named as a party defendant in the Tennessee suit, never was served personally with process and did not appear, so that its rights were in no way affected by the decision rendered. Of course it could not be, as it has not been, contended that the subsequent intervention of its receiver in the matter of the accounting had the effect of a previous appearance by the Home Circle itself.

But the decision rendered in Tennessee and affirmed in the highest court of that State is fully set out in the agreed facts upon which the case at bar was heard. That statement of facts agreed was not a case stated, strictly so called, but it was stipulated that the court might draw all proper inferences from the facts agreed. This decision was the only evidence before the court as to the law of Tennessee (R. L. c. 175, § 76), and no other inference could be drawn from it than that by the law of Tennessee the defendant had not the power to unite or consolidate with the Home Circle, and that, as to the defendant at any rate, the attempted consolidation was ultra vires and void. But this consideration is not necessarily fatal to the maintenance of the present action.

The agreed facts, as we have seen, constituted merely the evidence upon which the case was tried. Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 838, 836, and cases cited. Accordingly the question before us is whether, upon those facts and any inferences which the judge at the trial was warranted in drawing therefrom, his finding for the plaintiff can be sustained. Vahey v. Bigelow, ante, 89.

There is no dispute that the defendant attempted to assume the contract of insurance which had existed between Mrs. Tim-

berlake and the Home Circle. She became a member of a commandery which was organized as one of the defendant's subordinate commanderies or lodges. She was allowed and enjoyed all the privileges of membership in the defendant's organization. and was subjected to and bore all the burdens incident thereto. Her right to have a death benefit paid to her beneficiaries as stipulated in her certificate from the Home Circle was recognized by the defendant. Assessments were paid by her to the proper officers of her commandery, and were received from them by the defendant. It properly could be inferred, if indeed any other inference was possible, that these assessments were levied upon her by the defendant itself. This continued for nearly two years, during which time her payments, so made to and received by the defendant, amounted to a considerable sum, mainly if not wholly paid for the very insurance or death benefit which is now sought to be recovered. How the defendant kept these payments and what application it made of them does not appear to have been known to her, nor is she chargeable with any laches or neglect for having failed to inquire. The facts that have been stated must be construed with reference to the relative positions of the parties. What were these positions?

She had been a member of a fraternal beneficiary association incorporated under R. L. c. 119, and held a certificate therefrom by which it was promised that upon her death there should be paid to her beneficiaries, the present plaintiffs, a certain sum of money, provided among other things that she should duly pay such assessments as should be properly levied upon her. The defendant was a Tennessee corporation, organized for purposes substantially similar to those of the corporation of which she was a member, one of whose principal objects was to make contracts of fraternal insurance with its members. In substance, by its negotiations and final attempted agreement with the Home Circle, and by the notices which it could be found came to her with the consent and by the authority of the defendant, the defendant invited her to join its membership, to pay to it the assessments which it should thereafter levy for her insurance, and to comply as one of its members with its proper and lawful requirements; and in consideration thereof it promised to pay the amount named in her certificate to her beneficiaries, subject to the contingencies therein stipulated for. If the judge found, as manifestly he could find, that these facts were established, this was none the less an offer to her individually that it was made also to many other persons in the same situation as herself. It could be found that she accepted this offer by joining the defendant's commandery and paying regularly and promptly to the defendant through subordinate officers the requisite assessments in accordance with its table of rates. It is evident that upon these facts the judge could find that the contract relied upon by the plaintiffs was made between the defendant and Mrs. Timberlake.

But it is contended that this contract was beyond the power of the defendant to make, and so that this action thereon cannot be maintained.

It is said that Mrs. Timberlake could not have become a member of the defendant's organization, and so that no valid contract of insurance could have been made between her and the defendant, because the formal prerequisites to her admission as a member and to the making of a contract of insurance were not complied with. Most of these requirements are stated in the defendant's Law XI. She made no application for membership. No ballot was taken upon the question of her admission. She paid no admission fee, and did not present a recommendation from two members of the order. She underwent no medical examination, and her application was not approved by the defendant's supreme medical director.

It is to be observed that the question is not whether the attempted consolidation of the defendant and the Home Circle was void. That may be assumed. Knapp v. Golden Cross, 121 Tenn. 212. New Orleans, Jackson, & Great Northern Railroad v. Harris, 27 Miss. 517. Bankers' Union v. Crawford, 67 Kans. 449. Whaley v. Bankers' Union, 39 Tex. App. 385. Pearce v. Madison & Indianapolis Railroad, 21 How. 441. The present question is whether the corporation itself, having made such a contract as this, knowing it to have been made without compliance with the provisions of its own regulations, and having received the full consideration for which it stipulated, can afterwards avoid its contract as ultra vires by reason of such noncompliance.

The general rule governing such cases was stated in Davis v. Old Colony Railroad, 131 Mass. 258: "A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. . . . If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation. . . . There is a clear distinction, as was pointed out by Mr. Justice Campbell in Zabriskie v. Cleveland, Columbus, & Cincinnati Railroad, 23 How. 381, 398, by Mr. Justice Hoar in Monument National Bank v. Globe Works, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherley in Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 668, 684, between the exercise of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party." The first of these propositions is relied upon by the defendant. Its correctness is not doubted. It is amply supported by adjudged cases. There is no occasion to cite more than a few of these. Attorney General v. New York, New Haven, & Hartford Railroad, 197 Mass. 194, 197. Stevens v. Rutland & Burlington Railroad, 29 Vt. Dartmouth College v. Woodward, 4 Wheat. 518, 636. Bank of Augusta v. Earle, 18 Pet. 519. Central Transportation Co. v. Pullman's Palace Car Co. 139 U.S. 24. But the second proposition, the rightful limitation of the application of the general principle, is no less firmly established both in sound reason and authority. Slater Woollen Co. v. Lamb, 143 Mass. 420. Nims v. Mount Hermon Boys' School, 160 Mass. 177, 179. New York Bank Note Co. v. Kidder Press Manuf. Co. 192 Mass. 391, 404. J. G. Brill Co. v. Norton & Taunton Street Railway, 189 Mass. 431, 437. Bissell v. Michigan Southern of Northern Indiana Railroad, 22 N. Y. 258, 289. East St. Louis v. East St. Louis Gas Light & Coke Co. 98 Ill. 415. Bradley v. Ballard, 55 Ill. 418. State Board of Agriculture v. Citizens Street Railway, 47 Ind. 407, cited and followed in Hitchcock v. Galveston, 96 U. S. 841. Citizens State Bank v. Hawkins, 71 Fed. Rep. 869.

The principle last stated is decisive here. The contract with Mrs. Timberlake was not beyond the general scope of the authority given to the defendant by its charter and the law of its organization. It was a contract of the very kind which the defendant was created for the purpose of making. There was simply a failure to comply with certain regulations of its own framing, never communicated to her. No statute of Tennessee or judicial decision made in that State forbidding such a contract was in evidence; and no such statute or decision has been called to our attention. Under these circumstances the defendant has not the right to take the benefits of the contract by receiving Mrs. Timberlake's money as assessments upon a valid contract of insurance, and then to avoid the contract by reason of its failure to enforce its own private regulations unknown to her.

If it were necessary to consider that question, there is authority for saying that whatever might be the limits of the power of any one or more of its officers (Burbank v. Boston Police Relief Association, 144 Mass. 434; McCoy v. Roman Catholic Mutual Ins. Co. 152 Mass. 272; Kocher v. Catholic Benevolent Legion, 36 Vroom, 649), the corporation itself could waive the compliance by an intended member with any of its requirements not prescribed by its charter or the law of the State, for his admission to membership and the conclusion of a binding contract of insurance. Watts v. Equitable Mutual Life Association, 111 Iowa, 90. Morrison v. Odd Fellows Mutual Life Ins. Co. 59 Wis. 162. Wiberg v. Minnesota Scandinavian Relief Association, 73 Minn. 297.

The defendant did not mingle the money received from Mrs. Timberlake and other former members of the Home Circle with its other funds, but used them solely for the payment of death benefits upon certificates formerly issued by the Home Circle. As already intimated, we do not regard this circumstance as material. She neither knew nor was bound to know anything of what the defendant did with her money. It applied that money

as it chose, or as it found itself compelled by the court of Tennessee to do. But her rights were affected neither by the defendant's voluntary action nor by the orders of the Tennessee court made in a suit to which she was neither party nor privy and of which so far as appears she had no knowledge.

Some decisions have been made in the courts of other States under circumstances somewhat similar to those now before us. The defense here set up prevailed, as according to our reasoning it should have prevailed, in cases in which it was not shown that an intended member had paid any money to the defendant under the new contract of insurance, or that he had in any other respect changed his position in reliance upon that contract to the gain of the defendant or to his own detriment. Bankers' Union v. Crawford, 67 Kans. 449. Twiss v. Guaranty Life Association, 87 Iowa, 788. Whaley v. Bankers' Union, 89 Tex. App. 885. Where, however, as in the case at bar, it appeared that assessments or premiums had been regularly paid under the new contract, we have found no case in which this defense has been sustained. See the elaborate opinion in Cathcart v. Equitable Mutual Life Association, 111 Iowa, 471. The same fundamental principle was involved, though under different circumstances, in Bloomington Mutual Benefit Association v. Blue, 120 Ill. 121, 128, and Wuerster v. Grand Grove of Wisconsin of the Order of Druids, 116 Wis. 19.

These plaintiffs may sue in their own names upon the defendant's contract with Mrs. Timberlake, of which they were expressly made the beneficiaries. Dean v. American Legion of Honor, 156 Mass. 485.

No question is raised before us as to the amount which the plaintiffs are entitled to receive.

The judgment for the plaintiffs must be affirmed.

So ordered.

CUMBERLAND GLASS MANUFACTURING COMPANY vs. CHARLES M. WHEATON & others.

Suffolk. January 12, 1911. — April 3, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Contract, What constitutes, Construction. Guaranty. Agency. Damages, In contract.

In an action by a glass manufacturing corporation against the guarantors of the performance of a contract by a certain corporation to purchase two thousand gross of bottles to be made for it by the plaintiff, it appeared that the purchasing corporation had no financial rating and that guarantors were required by the plaintiff, that the names of the defendants as guarantors were submitted to and approved by the home office of the plaintiff, that a contract containing a guaranty clause was prepared on one of the regular forms used by the plaintiff and was delivered to the treasurer of the purchasing corporation, that this contract was signed by the defendants as guarantors but was not signed by the purchasing corporation itself, that it was delivered by the treasurer of that corporation to the plaintiff's manager, who in the presence of such treasurer indorsed upon it the plaintiff's acceptance, that the treasurer of the purchasing corporation by virtue of his office had authority to act for that corporation in all matters pertaining to its usual course of business and it did not appear that this authority was restricted by any vote or by-law. It was stipulated in the contract that it should not be binding until accepted at the plaintiff's home office, to which it was forwarded for indorsement. The plaintiff did not execute an indorsement of the contract at its home office, but retained it and never gave any notice of disaffirmance, and proceeded to perform the contract by manufacturing and delivering a part of the bottles, when its further performance was prevented by a repudiation of the contract by the purchasing corporation. Held, that these facts showed a delivery of the contract in behalf of the purchasing corporation and an acceptance of the contract by the plaintiff, the ratification of the act of the plaintiff's manager being sufficient without an execution of the instrument at the plaintiff's home office.

In an action against four guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a specified kind to be made for it by the plaintiff, if it appears that the contract of sale and guaranty was signed by all of the four defendants and was delivered to the plaintiff by one of them, who had acted with full authority from the other three and who knew that the contract of sale and guaranty was accepted unconditionally by the plaintiff, it is not necessary for the plaintiff to show that he gave notice to the defendants of his acceptance of the guaranty.

In an action against the guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a certain kind to be made for it by the plaintiff, where it appears that the delivery and acceptance of the contract of purchase containing the guaranty signed by the defendants were absolute and unconditional and that, after the plaintiff had manufactured certain bottles for the purchasing corporation in accordance with the terms of the contract and had delivered a part of them and had others ready for delivery, the purchasing

corporation failed to pay for the bottles delivered and notified the plaintiff that it would not receive or pay for any more bottles, the plaintiff need not show that he gave notice of these facts to the defendants, his proof of the default of their principal being sufficient.

In an action against a guarantor of the performance of a contract to purchase goods from the plaintiff, the defendant can set up the defense that he was not notified by the plaintiff of the default of his principal only where he can show that he was or might have been prejudiced by the failure to notify him of the principal's default. In the present case, where the nature of the contract was such that no notice of default was necessary, it appeared affirmatively that the plaintiff had resorted to all the possible remedies against the principal, so that, even if he had been given the notice of default to which he was not entitled, he would have been no better off.

In an action against the guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a certain kind to be made for it by the plaintiff, where the plaintiff shows that the contract of guaranty was absolute and unconditional, and that, after he had manufactured a certain number of bottles for the purchasing corporation in accordance with the terms of the contract, had delivered a part of them and had others ready for delivery, the purchasing corporation failed to pay for the bottles delivered and notified the plaintiff that it would not receive or pay for any more bottles, the plaintiff is entitled to recover from the defendants not only the price of the bottles delivered to the purchasing corporation but also damages for the loss suffered by the plaintiff by reason of the purchasing corporation's breach of contract in refusing to take the remainder of the bottles called for by the contract.

In an action against the guarantors of the performance of a contract for the purchase by a certain corporation of two thousand gross of a certain kind of bottles to be manufactured for it by the plaintiff, where the plaintiff shows a breach of the contract by the purchasing corporation, after a part performance by the plaintiff, by the failure of the purchasing corporation to pay for the bottles already delivered to it and its refusal to take or pay for any more bottles under the contract, if the guaranty clause in the contract signed by the defendants provides that, in consideration of the plaintiff furnishing to the purchasing corporation various styles of bottles covered by the order, the defendants "guarantee the account" of the purchasing corporation, this phrase does not restrict the liability of the defendants to the plaintiff's loss by reason of the failure of the purchasing corporation to pay for the bottles delivered, where the whole instrument in connection with the circumstances under which it was executed shows a clear intention on the part of the defendants to guarantee the performance by the purchasing corporation of all its obligations under the contract.

In an action against the guarantors of the performance of a contract for the purchase by a certain corporation of two thousand gross of a certain kind of bottles to be manufactured for it by the plaintiff, where a breach of the contract by the purchasing corporation after a part performance by the plaintiff is shown and the plaintiff is entitled to recover from the defendants not only the price of bottles delivered but also the loss suffered by him by reason of a refusal of the purchasing corporation to take or pay for any more bottles under the contract, if there is a provision in the contract that specifications shall be submitted to the plaintiff from time to time for bottles to be made, and that the quantities for delivery during June, July and August shall be specified not later than March 1, "each delivery to be considered a separate contract," the contract being an entire one for the manufacture and sale of the whole two

thousand gross of bottles, this provision does not limit the plaintiff's right to recover damages for all the portion of the contract which has been repudiated by the purchasing corporation.

CONTRACT, in three counts, on an alleged guaranty by the defendants of the performance by the Yo-Yo Company, a corporation, of a contract by that company to buy, and of the plaintiff to manufacture and sell, two thousand gross of bottles of a peculiar and special shape and character and specially lettered and marked, the three counts of the declaration being described below. Writ in the Municipal Court of the City of Boston dated August 7, 1908.

The contract sued upon was as follows:

- "Memorandum of sale executed in duplicate, July 18, 1907.
- "The Cumberland Glass Manufacturing Company agree to sell and Yo-Yo Co. of Boston, Mass. agree to buy the following goods, per prices, terms, etc., specified below:
- "Specifications are to be submitted to the said Cumberland Glass Mfg. Co. from time to time (beginning at once) for ware to be made, and the quantities for delivery during June, July, and August to be specified not later than March 1st, each delivery to be considered a separate contract.
- "Terms, F. O. B. shipping point, with an allowance of 16 cents per 100 lbs. freight; 1% off ten days, net cash thirty days. Contracts contingent upon strikes, accidents, and other causes beyond the control of both parties.
- "The amount of credit extended for goods shipped to be determined by the Cumberland Glass Mfg. Co. from time to time during the life of the contract, and upon violation of this contract by either party, the other party shall have the option to cancel the balance of contract.
- "Breakage in transit and first filling should there be any, to be allowed only in excess of 5% of the shipment, in which the breakage occurs, and then only upon the goods being receipted for at destination as received in bad order.
- "This contract not to be considered binding until accepted at the home office, Bridgeton, N. J.
- "Two thousand (2000) gross of special soda bottles 7 1/2 oz. capacity and 13 oz. average weight variation between twelve and fourteen ounce, like model submitted by the Cumberland

Glass Co., bottles to be made in Light Green glass at \$3.85 per gross. Goods to be taken packed in bulk in carload lots, prior to September first 1908 F. O. B. Bridgeton, N. J. freight allowed to Boston.

"It is understood and guaranteed that the quality and class of workmanship shall be satisfactory and that the bottles covering this order shall be made by Union workmen.

"The said Yo-Yo Co. have the privilege of cancelling any part up to and including fifty per cent of this order on or before January 20, 1908.

"In consideration of the Cumberland Glass Mfg. Co. furnishing The Yo-Yo Co. various styles of bottles covered by this order we or each of us guarantee the account of the said Yo-Yo Co.

"E. G. Bradshaw, 101 Tremont St. Boston.
C. M. Wheaton, Winthrop Mass.
John Everett, Canton Mass.
Alice H. Bradshaw, Gardner Mass."

"Accepted

"The Cumberland Glass Mfg. Co. Per J. C. Shoemaker, Agt."

The first count of the declaration was for the price of three hundred and a fraction gross of bottles sold and delivered under the contract by the plaintiff to the Yo-Yo Company, for which that company failed to pay. The second count was to recover damages for the refusal of the Yo-Yo Company to receive any more bottles under the contract after the delivery and receipt of those mentioned in the first count. The third count, after alleging the failure of the Yo-Yo Company to pay for the bottles delivered and its repudiation of its contract with the plaintiff, alleged that the plaintiff at the time of the repudiation had manufactured on the order of the Yo-Yo Company under the contract two hundred and three gross of bottles which were ready for delivery, in addition to the three hundred and a fraction gross of bottles which had been delivered and were unpaid for. It further alleged the insolvency and the bankruptcy of the Yo-Yo Company.

On appeal to the Superior Court the case was tried before Aiken, C. J. By the terms of the contract the Yo-Yo Company had the privilege of cancelling fifty per cent of the order for

two thousand gross of bottles on or before January 20, 1908, but the notice of the Yo-Yo Company's inability to pay for the bottles was not sent until after that date and there was no previous cancellation.

No question was made that if the plaintiff was entitled to recover on the first count, it was entitled to recover the sum of \$1,046.49; if it was entitled to recover on the second count it was entitled to the sum of \$427.37; if entitled to recover on the third count it was entitled to recover a further sum of \$639.02. If it was entitled to recover on all three counts, it was entitled to recover the sum of \$2,000, the jurisdictional limit of the Municipal Court of the City of Boston in which the action was brought.

The liability of the defendants was based upon the concluding paragraph of the contract as quoted above. The contract never was signed by any one in behalf of the Yo-Yo Company but was signed by the four defendants.

Neither the defendant Wheaton nor any one representing him appeared at the trial and he was defaulted at the close of the evidence. The defendants F. G. Bradshaw, Everett, and Alice H. Bradshaw defended the case.

The important facts shown by the plaintiff's evidence are stated in the opinion. At the close of the plaintiff's evidence the attorney for the three contesting defendants stated that he did not desire to put in any evidence, but asked the Chief Justice to rule as follows:

- 1. There was no evidence that the defendants' guarantee was accepted by the plaintiff at its home office.
- 2. That there was no evidence that the plaintiff's agent, who signed an acceptance of the contract, was authorized so to do.
- 3. That no notice was given to these defendants of the acceptance of their guarantee.
- 4. That the plaintiff did not notify these defendants of any sales to the Yo-Yo Company.
- 5. That the plaintiff did not seasonably notify these defendants that that company did not pay for the goods delivered.
- 6. That by reason of the attachment of the property of the Yo-Yo Company, these defendants, not having been notified, were unable to secure themselves.

7. That as to the second and third counts the liability alleged is solely for damages, and not upon an "account," which alone, if at all, these defendants guaranteed.

The Chief Justice refused to make any of these rulings, and the contesting defendants excepted. They thereupon asked the Chief Justice to order a verdict in their favor, which he refused to do, and they again excepted.

The Chief Justice thereupon ordered the jury to return a verdict for the plaintiff in the sum of \$2,000 against all of the defendants; and the contesting defendants alleged exceptions.

- S. H. Tyng, (T. H. Mahony with him,) for the contesting defendants.
 - C. F. Dutch, for the plaintiff.

BRALEY, J. The defendants having offered no evidence at the trial and having conceded at the argument that the testimony introduced by the plaintiff should be treated as conclusive proof of the facts, the verdict ordered and returned for the plaintiff must stand unless the rulings of law were erroneous.

The action is brought to recover from the contesting defendants as guarantors, a debt due to the plaintiff for glass bottles sold to their principal, the Yo-Yo Company, hereinafter referred to as the company, and for damages arising from a breach of the contract by the purchaser. Before the contract of sale, negotiations as to its terms and conditions were had with the plaintiff's local manager and the treasurer of the company. The company having no financial rating, guarantors were required, and the names of the defendants were submitted to and approved by the home office of the plaintiff. A contract on one of the regular forms used by the plaintiff, which contained not only the contract of sale but the clause of guaranty, was prepared and delivered to the treasurer and general manager of the company. It purports by the recitals in the first paragraph to be a contract between the respective corporations, and it is only in the last paragraph that the defendants in consideration of the plaintiff furnishing the company the "various styles of bottles covered by this order" guaranteed "the account." The declaration in each count alleges, that the contract was signed by the company, yet it was executed only by the defendants, and then delivered by the treasurer to the plaintiff's manager, who

apparently in his presence indorsed upon it the plaintiff's acceptance. But the intention of the treasurer to adopt and present it as the contract of the corporation is clear, and the defendants do not question that by virtue of his office he had authority to act in all matters pertaining to its usual course of business unless restricted by some vote or by-law, of which there is no evidence. Fillebrown v. Hayward, 190 Mass. 472, 480, and cases cited. It was stipulated in the contract that it should not be binding until accepted at the plaintiff's home office, to which it was forwarded after the indorsement. If the act of the manager was not within the scope of his agency, a written acceptance was not required, and the plaintiff never having given notice of disaffirmance and having manufactured and delivered a part of the bottles, there was sufficient proof that it not only accepted the agreement but independently ratified the act of its manager. Springfield v. Harris, 107 Mass. 582. Beacon Trust Co. v. Souther, 188 Mass. 418, 416.

But, if the contract of sale was accepted and the principals became bound, the defendants assert that they were not bound for want of notice to them of the acceptance of the guaranty. If the defendant's undertaking had been merely a contingent offer to become responsible, notice to them of the plaintiff's acceptance would have been necessary to complete the guaranty. Mussey v. Rayner, 22 Pick. 223. Bishop v. Eaton, 161 Mass, 496. The instrument, however, was executed and delivered by them to the treasurer, who was one of the guarantors, and the defendants do not contend that they were ignorant of its contents or of the purpose for which they signed or of the fact that it was to be delivered by him to the plaintiff. Having made the treasurer and co-guarantor their agent, they were bound by his acts in the formation and completion of the contract, and his knowledge of the plaintiff's acceptance or affirmation, as if they had been individually present. Graham v. Middleby, 185 Mass. 849, 855. New-Haven County Bank v. Mitchell, 15 Conn. 206. Noyes v. Nichols, 28 Vt. 159. Nading v. Mc Gregor, 121 Ind. 465. delivery and acceptance of the contract of sale and the incorporated contract of guaranty, which was absolute and unconditional, were contemporaneous, and the sale of the goods and the extension of credit in reliance upon the guaranty were consummated as the parties intended by one connected transaction. A further or final notice of acceptance under these circumstances would have been a vain and useless act. Paige v. Parker, 8 Gray, 211. Lennox v. Murphy, 171 Mass. 370, 873. Lynn Safe Deposit & Trust Co. v. Andrews, 180 Mass. 527. Bank of Newbury v. Sinclair, 60 N. H. 100. Smith v. Dann, 6 Hill, 543. Noyes v. Nichols, 28 Vt. 159, 177, 178. New-Haven County Bank v. Mitchell, 15 Conn. 206, 218, 219. Wise v. Miller, 45 Ohio St. 388. Mitchell v. McCleary, 42 Md. 374. Heyman v. Dooley, 77 Md. 162. Wills v. Ross, 77 Ind. 1. Frost v. Standard Metal Co. 215 Ill. 240. Davis v. Wells, 104 U. S. 159. Davis Sewing Machine Co. v. Richards, 115 U. S. 524.

Nor was the plaintiff required to notify the defendants of sales made to their principal, or that, the company after the contract had been partially performed having given notice that it would be unable to pay for future deliveries in accordance with its terms, the plaintiff ceased further performance, but did not exercise the option of cancellation. It was said in Vinal v. Richardson, 18 Allen, 521, 527, where the doctrine invoked by the defendants is elaborately discussed by Wells, J., "It is true, there are authorities to the effect that a demand upon the party primarily liable, and notice of his default given to the guarantor, are necessary, before any action can be maintained upon the guaranty. But the better doctrine, and that which seems to us to be best supported, both upon reasoning and authority, is that demand and notice are not essential prerequisites to an action, and need not be alleged nor proved, unless the terms of the guaranty, or the nature of the thing guaranteed, require such proceeding, in order to [show] a proper fulfilment of the obligations imposed by the guaranty upon the party holding it, or in order to establish a default by the principal and a breach of the contract declared on. . . . It must be derived, if it exist, from the terms of the contract, or the nature and circumstances of the particular case, and not from the general rule." The contract guaranteed was specific as to the quantity of bottles to be manufactured, and the price, and there was no contingency under which credit could be so extended, at the option of the plaintiff, as to create a liability in excess of that contemplated and secured by the defendants. If the guaranty had

not been furnished, the contract would not have been made. expressly formed part of the consideration, and the defendants must be held to have understood that the contract was to be performed according to its terms, by which no notice to them of either the debtor's failure to pay for goods delivered or refusal to receive and pay for goods manufactured but not delivered, was required. The plaintiff having proved a default by the principal, was not compelled to prove notice to the defendants of the default in order to recover. Vinal v. Richardson, 13 Allen, 521. Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85. Welch v. Walsh, 177 Mass. 555. A. M. McPhail Piano Co. v. Meservey, 168 Mass. 209. Smith v. Dann, 6 Hill, 543. New-Haven County Bank v. Mitchell, 15 Conn. 206. Mathews v. Chrisman, 12 Sm. & M. 595. Noyes v. Nichols, 28 Vt. 159. Dickerson v. Derrickson, 89 Ill. 574. Hitchcock v. Humfrey, 5 Man. & G. 559. Heyman v. Dooley, 77 Md. 162. Bank of Newbury v. Sinclair, 60 N. H. 100, 106. Wise v. Miller, 45 Ohio St. 888. Nading v. McGregor, 121 Ind. 465. Hubbard v. Haley, 96 Wis. 578. Goring v. Edmonds, 6 Bing. 94.

But upon a narrower ground, the defendants' position is not well taken. The guarantor can insist upon the defense of want of notice only where he has been or may be prejudiced by the failure to notify of the principal's default. Vinal v. Richardson, 18 Allen, 521, 528. Salisbury v. Hale, 12 Pick. 415. Bishop v. Eaton, 161 Mass. 496. Davis v. Wells, 104 U. S. 159. The plaintiff upon the debtor's default diligently pressed for payment, and then brought suit and attached the company's property. The attachment was dissolved by proceedings in bankruptcy, and the plaintiff proved the claims demanded in the present action, and credited the dividend received. If the defendants upon notice had paid the indebtedness, adjusted the damages claimed and sued their principal, or proved in bankruptcy its liability to them, they would have derived no greater benefit than that conferred by the plaintiff's suit and proof.

But, if the plaintiff is entitled to recover, the defendants, while admitting their liability under the first count for the bottles delivered, deny that they are responsible in damages under the second and third counts for the company's breach of the contract. If the language of their obligation is restricted to bottles VOL. 208.

delivered, they are right in this contention. It is however the intention of the parties to be ascertained from the whole instrument, viewed in connection with the conditions when the contract was made, which must control. Bent v. Hartshorn, 1 Met. 24, 25. Smith v. Vose & Sons Piano Co. 194 Mass. 198. The contract of sale is entire, even if each delivery of bottles as the company called for them is stipulated to be a separate contract for which payment could be enforced. Fullam v. Wright & Colton Wire Cloth Co. 196 Mass. 474, 476. It was not merely an obligation to pay the instalments as they became due, but an absolute promise to make the plaintiff whole for the full amount if the debtor defaulted. The measure of the plaintiff's recovery consequently is commensurate with the company's liability. The plaintiff could have sued the company for the breach, but it could not enhance damages by manufacturing bottles after notice that the company declined to accept them. It would have been entitled only to the difference between the market price and the contract price for bottles ready for delivery and bottles to be manufactured to the amount called for by the contract. Barrie v. Quinby, 206 Mass. 259. The defendants, however, if held in damages do not question the assessments, and the result is, that all their requests for rulings and their request that a verdict be ordered in their favor were rightly denied.

Exceptions overruled.

JOHN A. BERG vs. OLD COLONY STREET RAILWAY COMPANY.

Plymouth. January 12, 1911. — April 3, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Negligence, In use of highway.

A person in command of his senses, who, in crossing a city street, containing double tracks of a street railway over which he knows cars run "pretty often," does so at a point two or three hundred feet from the nearest crosswalk and in a diagonal direction with his back partially turned toward an approaching car, which, if he had looked, he could have seen for a long way, and neither looks nor listens for an approaching car and is run over, as a matter of law is not taking the precautions which the circumstances call for and is not in the exercise of due care.



TORT for personal injuries from being run over by an electric street car of the defendant as stated in the opinion. Writ dated June 26, 1907.

In the Superior Court the case was tried before Hardy, J. Besides the facts stated in the opinion, there was evidence that the accident happened at five o'clock or a little later on the afternoon of Sunday, January 20, 1907, that it was dusk and that there were double tracks of the defendant upon the street. The plaintiff testified that he was sufficiently familiar with the locality to know that these tracks were level and straight for a long way in either direction; that the car which struck him was bound from Campello to Brockton; and that any one standing at the point from which he left the sidewalk could see a long way back toward Campello.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

C. H. Johnson, for the plaintiff.

Asa P. French & J. S. Allen, Jr., for the defendant.

LORING, J. The plaintiff in the case at bar was run over by one of the defendant's cars while crossing Main Street in the city of Brockton, at a point some two or three hundred feet away from the nearest crosswalk. He testified that he knew of the defendant's tracks and that cars came over them "pretty often" and yet that he neither looked nor listened for an approaching car, and that he neither saw nor heard the one which ran over him. It also appeared from his testimony that he was walking across the street in a somewhat diagonal direction away from the point from which the car in question was coming. In addition there was affirmative evidence that he was not intoxicated.

The case comes within the second class of cases in *Donovan* v. *Bernhard*, ante, 181.

Exceptions overruled.

BEVERLY McDonough vs. Boston Elevated Railway Company.

GEORGE E. MANSER vs. SAME.

Middlesex. January 17, 1911. — April 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Negligence, Street railway, Res ipsa loquitur. Evidence, Presumptions and burden of proof. Practice, Civil, Declaration, Specifications.

At the trial of an action for personal injuries by a passenger against a street railway company, the plaintiff testified that, as he was sitting with his back toward the car window, he felt a blow or shock and lost consciousness, which he regained in a physician's office, that he knew what an electric shock felt like and that the feeling he had when injured was such as he had experienced when he had had an electric shock, that one of his arms was broken in three places and that the next day there were water blisters all up and down it, that the physician who attended him, who died before the trial, had told him that he was suffering from a severe electric shock. There also was evidence tending to show that the accident occurred upon a bridge upon which the defendant maintained double tracks which in the middle of the bridge were farther separated than at the ends, that the plaintiff, when he lost consciousness, was sitting on the side of the car toward the other track with an iron grating, with which his body was in contact, at his back, and that a car was passing at a point where the tracks curved toward each other, that the car upon which the plaintiff was a passenger was of the semi-convertible type and the body of the car was so pivoted that it would swing as the car passed over a curve, that as the two cars passed there was a noise "as though the cars came together or something was rubbing like r-r-r-r-r-." An electrical expert, called by the plaintiff, testified that in his opinion ends of cars going in opposite directions at the point described might come in collision and that, if they did, and the insulation of the cars was imperfect, electricity from one car could charge the iron grating on the other and one touching the grating could receive such injuries as the plaintiff testified that he had received. Held, that the case was one for the jury on the question of the negligence of the defendant or its employees, because the testimony of the plaintiff called for an application of the doctrine res ipsa loquitur, and because the fact that the plaintiff attempted to explain the accident did not deprive him of the right to rely on that doctrine.

Where a declaration in an action of tort for personal injuries by a passenger against a street railway company alleged generally that the injuries were caused by negligence of the defendant, and, in response to a motion for specifications of negligence, the plaintiff, after specifying some particulars, added, "And the plaintiff further says that he is unable to further specify as to the negligence of the defendant," if the evidence at the trial is such as to call for an application of the rule res ipsa loquitur, the plaintiff is not precluded from relying thereon although he has introduced no evidence to warrant a finding that the defendant was negligent in any of the particulars that he specified.

Two actions of tort for personal injuries received by the plaintiffs while they were passengers upon an electric street car of the defendant. Writs dated December 21, 1907.

In the Superior Court the cases were partly tried together before White, J., upon declarations in each case containing two counts, the first alleging that the injuries to the plaintiffs were "by reason of the negligence of the defendant, its agents or servants in operating and controlling said car, and in controlling the electric current by which said car was propelled, the plaintiff received a severe electric shock"; and the second alleging as the cause of the injuries negligence of the defendant, its servants and agents, in that they "so carelessly and negligently started said car and in controlling the electric current by which said car was propelled, plaintiff received a severe electric shock whereby the plaintiff during all this time was in the exercise of due care on his part, by reason of said negligence the plaintiff was thrown down with great force and violence." Before the evidence for the defendant had closed, the presiding judge, on motion of the plaintiffs, allowed the declarations to be amended by adding to each the following:

"Third Count: And the plaintiff says that the defendant is a corporation carrying passengers on an electric railway in the cities of Boston and Medford, and that on the 19th day of September, 1907, plaintiff was a passenger on a car of the defendant corporation, which was proceeding from Sullivan Square to Medford and that he was injured while in the exercise of due care on account of the negligence of the defendant, its agents and servants. And the plaintiff says that by reason of his said injuries he has suffered great damage and has been put to great expense for medicines, medical services and attendance. All to the great damage of the plaintiff. And the plaintiff further says that all three counts are for one and the same cause of action."

At the request of the defendant, the cases then were continued. Thereafter, upon the defendant moving for specifications, each plaintiff specified as to the third count as follows:

"First. That the negligence of the defendant, its agents and servants, relied upon by the plaintiff in the third count of the plaintiff's amended declaration; consisted of running the car upon which the plaintiff was a passenger on a track which was

so near an adjoining track that a car being run upon the adjoining track and the car upon which the plaintiff was riding came into contact with each other, or that the car upon which the plaintiff was riding came in contact with some portion of the bridge over which said car was passing at the time; the plaintiff meaning to claim by these answers that the accident occurred either on account of the car upon which the plaintiff was riding coming in contact with some portion of the bridge, or coming in contact with a car upon an adjoining track, and that the negligence either consisted in the negligent management, operation or control of the defendant's cars, or that the tracks were too near together and that the track was too near a portion of the bridge, and that the car upon which the plaintiff was riding or the car upon the other track was so wide that it came in contact either with the bridge or other car.

"And the plaintiff further says that he is unable to further specify as to the negligence of the defendant."

The cases then again were tried together before *Hitchcock*, J. Such facts as are material to an understanding of the decision are stated in the opinion. At the close of the evidence, the defendant asked the presiding judge to rule as to each count of each declaration that the plaintiff was not entitled to recover thereon. The rulings were refused. There were verdicts for the plaintiffs; and the defendant alleged exceptions.

W. Shuebruk, (F. W. Fosdick with him,) for the defendant. R. H. Sherman, (J. A. Kelleher & C. L. Allen with him,) for the plaintiffs.

LORING, J. These were two actions tried together. Both the plaintiffs were sitting on the smokers' seat in the rear of the cross seats of one of the defendant's semi-convertible cars at the time of the accident here complained of. McDonough was sitting at the forward end of the smokers' seat next the first cross seat. Manser was sitting next to him, and one Mulligan, who was called as a witness by the plaintiffs, sat in the corner. Of a sudden Manser fell forward into the aisle holding on to his head and McDonough felt a blow or shock and came to in a doctor's office. One of his arms was broken in three places and the next day there were water blisters all up and down it. Each plaintiff testified that he knew what an electric shock felt

like and that at the time in question they had a feeling like that which they had experienced when they had had an electric shock. In addition McDonough testified that the doctor (since deceased) who attended him "told him that he was suffering from a severe electric shock." There was evidence that a large car of the defendant passed the car in question at the time the accident happened, and that as it passed there was a noise (to quote one of the plaintiffs' witnesses) "as though the cars came together, or something was rubbing like r-r-r-r-r."

There was evidence that the windows behind the plaintiffs were open and outside the windows and distant five inches from the back of the seat on which they were sitting was a wire grating; and that there was a metallic piece in the floor near the head of the smokers' seat which "would make a ground for electricity."

The accident happened just before the car came to a drawbridge, or just as it left it, - which was not clear on the evi-There was evidence that the defendant's tracks on the drawbridge were farther apart than they are in the streets, and that not far from each end of the bridge they curve in to the ordinary street width. An expert witness called by the plaintiffs testified that these large cars swing on a pivot in the middle and that if the forward end of one car was swinging around this curve going one way and the rear end of another was swinging around it going the other way they might collide. The same witness testified that he had examined the car here in question. After describing the arrangements of electricity in it he testified that if the ends of two cars did meet as they swung around the curves above mentioned and the insulation of the cars was imperfect, electricity from one car could charge the grating of the other and if the plaintiffs' head or hand was in contact with the grating they could receive such injuries as the plaintiffs testified they had received. There was some evidence that Manser's head and one of McDonough's hands were against the grating, and there was evidence that warranted a finding that the defendant had not adopted reasonable means to ascertain whether the insulation of the wiring on its cars was impaired.

The defendant's argument in support of its contention that

this evidence did not warrant a verdict for the plaintiffs is in effect that each step which leads up to the plaintiffs' having received electric shocks was not fully proved. But the jury were warranted on the plaintiffs' testimony alone in finding that they did receive electric shocks and that fact, if believed, is a fact which could be relied on to help out proof of some details. In addition the happening of the accident itself gave rise to the application of the doctrine of res ipsa loquitur, and the plaintiffs' attempt to explain the accident did not deprive them of the right to rely on that. See McNamara v. Boston & Maine Railroad, 202 Mass. 491, where the cases are collected.

The defendant also has contended that there was no evidence warranting a finding that the defendant was negligent "in controlling the electric current by which said car was propelled," and that in the absence of such evidence a verdict for the plaintiffs on the first and second counts could not be found. For the reasons already given we are of opinion that there was evidence of that fact.

The defendant has assumed that in case of the third count the plaintiffs were confined to the facts stated in its specifications. In our opinion that is not so. It is manifest that the presiding judge at the first trial allowed the plaintiffs to amend the declarations by adding the third count (alleging general negligence) to enable them to rely on the doctrine of res ipsa loquitur. The defendant could not deprive the plaintiffs of that right by requiring them to file specifications and by so cutting down that count to a count alleging special negligence. In our opinion the plaintiffs maintained their right to rely on their allegation of general negligence in the third count by adding to the specifications filed by them: "And the plaintiff further says that he is unable to further specify as to the negligence of the defendant."

Exceptions overruled.

MARY A. GRAY vs. GEORGE L. BATCHELDER.

Norfolk. January 17, 1911. - April 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, In use of highway, In use of automobile.

At the trial of an action against the owner of an automobile for personal injuries caused by the plaintiff being run against by the automobile, there was evidence tending to prove the following facts: The plaintiff had been walking upon a sidewalk, which was upon the left hand side of a highway as she proceeded, when she came to a barrier cutting off the entire sidewalk, and in the street against the sidewalk at that point a two horse dray stood facing her. She therefore turned into the street to go around the dray, as she saw other persons doing, and had reached a point " just beyond the horses' heads" when she heard the horn of the defendant's automobile about sixty feet away, and judged that the automobile would pass her "all right." She stood perfectly still where she was against the front wheel of the dray and the front wheel of the automobile passed her without hitting her, and then the automobile swerved and either the mud guard over the rear wheel or the canopy struck her. The only persons in the automobile were the defendant's wife and his chauffeur, who was running the car, and both of them testified that they did not see the plaintiff and did not know that an accident to the plaintiff had happened until they were told of it afterwards. Held, that the questions, whether the plaintiff was in the exercise of due care when injured, and whether the defendant's chauffeur was negligent, were for the jury.

TORT for personal injuries from being run into by the defendant's automobile on Washington Street in Boston, as stated in the opinion. Writ dated October 5, 1908.

In the Superior Court the case was tried before Sherman, J. The facts are stated in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for the defendant. The judge refused to do so. The jury found for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

The case was submitted on briefs.

H. C. Sawyer, for the defendant.

G. A. Healy, for the plaintiff.

LOBING, J. The jury were warranted in finding that the circumstances of this accident were as follows: As the plaintiff was walking north on the west or left hand sidewalk of Washington Street, she came to a temporary fence blocking off the sidewalk entirely for some distance not stated. She found a

two horse dray facing south, drawn up against that portion of the sidewalk which was thus blocked off. She started to go around the horses and the dray to reach the sidewalk beyond the blocked off portion as she saw other people doing. When she had reached a point "just beyond the horses' heads" she heard an automobile horn and saw an automobile car (which turned out to be the defendant's), about sixty feet away, coming toward her at a moderate rate of speed. The plaintiff testified that she looked before she stepped from the sidewalk and looked again as she stepped around the horses' heads, and that when she saw the car it seemed to her that it would pass her "all right." When she saw the car she stood perfectly still where she then was, against the front wheel of the dray. After the forward wheel of the car had gone by without hitting her the car swerved out, throwing some portion of the rear of it against her and she was hit by the mud guard over the rear wheel or by the canopy and thus suffered the injuries here complained of. If the jury found these to be the facts they were at least warranted in finding that the plaintiff was in the exercise of due care. It is doubtless true that the plaintiff would have been in a safer place if she had taken a step or two more and placed herself between the forward and rear wheels of the dray. But she testified that it seemed to her that the car would pass her "all right" if she stood still, and apparently it would have done so if it had not swerved out throwing the rear end in. It cannot be said as matter of law that she was not in the exercise of due care in doing as she did.

The only persons in the car were the defendant's wife and his chauffeur, neither of whom saw the plaintiff, and both of whom testified that they never knew of the accident to the plaintiff until told of it after it had occurred. This again at least warranted a finding of negligence.

We have examined all the cases cited by the defendant and find nothing in any of them which requires notice.

Exceptions overruled.

ROSE McGuinness vs. Patrick J. Kyle & another.

Suffolk. January 20, 1911. — April 8, 1911.

President: Knowlton, C.J., Morton, Loring, Brally, & Rugg, JJ.

Payment. Pleading, Civil, Answer. Bills and Notes.

In an action against two defendants upon a joint and several promissory note signed by both of them as makers, the defendants cannot claim a set-off for services severally rendered by them to the plaintiff for which nothing is due to them jointly.

The makers of a joint and several note can make with the payee at the time of the delivery of the note a binding agreement that, when it comes due, the makers shall set off against the note the value of services rendered by them severally to the payee, and in an action by the payee against the makers upon the note, the makers, if they set up such independent collateral agreement in their answer, can rely thereon in defense.

In an action by the payee against the makers of a joint and several note, in which the answer contains only a general denial and an allegation of payment, the defendants cannot rely upon an independent collateral agreement that the payee would set off against the note the value of services to be rendered to him by the makers severally.

In an action against a husband and wife upon a joint and several promissory note of which they were the makers, the defendants in their answer alleged a general denial and payment. At the trial the execution and delivery of the note for a valuable consideration were admitted, and there was evidence that the plaintiff had agreed when the note was given that certain services thereafter to be rendered to the plaintiff by the defendants severally should be credited upon the note, and that such services were rendered. The husband testified that at some time in the year when the note became due the plaintiff said to him that he owed the plaintiff money, to which the husband replied that he did not, that thereupon the two went to see a common friend to whom they explained the matter and who said it was "all right" on the defendants' part, "and they then came away and the plaintiff appeared perfectly satisfied and never made any claim . . . afterward until the bringing of the suit." A verdict for the plaintiff was ordered. Held, that the verdict should not have been ordered, because a finding was warranted that the plaintiff and the defendant husband, who acted for both defendants, agreed to set the two claims then due one against the other, and, if the jury so found, each claim would have paid the other and the defense of payment would have been made out.

CONTRACT against a husband and wife upon a joint and several promissory note for \$400. Writ in the Municipal Court of the City of Boston dated September 12, 1906.

The answer was a general denial and payment.

The defendants also filed a declaration in set-off upon an

account annexed containing ten items for various services alleged to have been rendered for the plaintiff, the items aggregating \$495. The bill of exceptions stated that the set-off was "for services rendered, mainly by the defendant Patrick J. Kyle, and partly by the defendant Mary F. Kyle, under the circumstances and agreement stated in "the testimony.

In the Superior Court the case was tried before Stevens, J. The facts material to an understanding of the decision are stated in the opinion. At the close of the evidence the defendant asked the presiding judge to instruct the jury "(1) that they had a right under the evidence in this action, if the jury believed the defendant Patrick J. Kyle, to set off the value of the services charged in the defendants' declaration in set-off against the note in said suit, (2) that the jury, if they believed the defendant Patrick J. Kyle, would have the right to have the value of the services so charged in said declaration in set-off allowed as payments on account of said note." The judge refused to give either instruction asked for. In reply to an inquiry by the judge, the defendants' counsel stated that it was admitted that the note was given by the defendants, and that the defendants contended that there were services rendered by each one of the defendants, that it was agreed when the note was given to the plaintiff that the services rendered by each of the defendants should be set off by the plaintiff upon the note, and that under those circumstances the defendants had the right to set off under that agreement the value of the services which each of the defendants rendered; and also that, under the evidence in the case, the defendants had a right to show that the services rendered and payments made by the defendants, in the way that the evidence disclosed, amounted to a payment of the note.

The presiding judge then said that the only question was, whether it could be said in any sense of the word, that the services were payments; that they could not be set off; and he ordered the jury to return a verdict for the plaintiff in the sum of \$488.88, and a verdict for the plaintiff on the defendants' declaration in set-off. The defendants alleged exceptions.

The case was submitted on briefs.

W. B. Orcutt, for the defendants.

M. W. Breck, for the plaintiff.

LOBING, J. The presiding judge was right in ruling that the declaration in set-off could not be sustained (if for no other reason) because the sums there relied on were not due to the defendants jointly. Barnstable Savings Bank v. Snow, 128 Mass. 512. Walker v. Leighton, 11 Mass. 140.

The defendant Kyle testified "that at the time the note was given, he told the plaintiff that the pay for the services which he had already rendered for the plaintiff and for the further services which he and his wife should thereafter render for the plaintiff or any persons connected with her in certain court cases, would be taken out of the note, and that the plaintiff in reply said that was all right." This was in effect, or could have been found by the jury to have been in effect, an agreement that when the note came due the plaintiff on one side and the two defendants on the other should have a settlement by setting off, one against the other, these separate claims which otherwise would not be the subject of set-off. Borden v. Sackett, 113 Mass. 214. Johnson & Kettell Co. v. Longley Luncheon Co. 207 Mass. 52, There is nothing to prevent parties from making an agreement that on the maturity of a claim due from the defendant to the plaintiff a claim then due from the plaintiff to the defendant arising out of a separate transaction should be settled and one set off against the other. Such an agreement is an independent collateral agreement and does not contradict the contracts between the parties which gave rise to the separate claims. See Crosman v. Fuller, 17 Pick. 171; Kinnerley v. Hossack, 2 Taunt. 170; Jones v. Snow, 64 Cal. 456; Heckenkemper v. Dingwehre, 32 III. 538; Hall v. Paris, 59 N. H. 71.

If there had been nothing more in the defendants' case than this testimony of the defendant Kyle, the presiding judge would have been right in directing a verdict for the plaintiff because the defendants had pleaded payment, not an agreement to set off claims not the subject of set-off.

But there was more than that in their case. Kyle further testified that some time in 1906 (the year the note became due) the plaintiff said to him that he owed her money and he said he did not, and thereupon they went to see a common friend and explained the matter to him and the friend said it was all right on Mr. Kyle's part, "and they then came away and the plaintiff

appeared perfectly satisfied, and never made any claim on him afterward until the bringing of the suit." This warranted a finding that the plaintiff and the defendant Kyle (acting for both defendants) agreed to set the two claims then due one against the other. If they did, each in legal contemplation paid the other, as was decided in *Breck* v. *Barney*, 183 Mass. 133, and the defense of payment was made out.

Exceptions sustained.

ISABEL F. MARR vs. BOSTON AND MAINE RAILROAD.

Middlesex. January 27, 1911. — April 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Negligence, Railroad.

At the trial of an action by a woman passenger against a railroad company for personal injuries caused by the plaintiff being pushed off the platform of a car as she was alighting in a station of the defendant, if there is evidence tending to show that as the plaintiff stood on the platform of the car she waited until the skirts of a woman in front of her were off the top stairs, and that then as she put one foot down to the top step she was pushed off the car by a man behind her, that the car was crowded before it reached the station, but that there were only twenty persons behind the plaintiff as she passed out of the car, that there was a good deal of pushing and jostling among them, and that that train usually was crowded; and if there is no evidence that on previous occasions the passengers had jostled or pushed each other, a finding of negligence on the part of the defendant and its servants in failing to guard its passengers from injury due to the conduct of crowds would not be warranted, both because on the evidence there was no reason why the defendant should have anticipated that the person who pushed the plaintiff would do so, and because the overcrowding of the car had ceased before the plaintiff was pushed.

At the trial of an action by a woman passenger against a railroad company for personal injuries caused by the plaintiff being pushed off the platform of a car as she was alighting in a station of the defendant, if there is testimony that the part of the platform of the station where the car stopped was dark, and the plaintiff testifies that she waited until the skirts of a woman who preceded her "were off the top stairs so that I could step down," and that as she was stepping down to the top step a man behind her pushed her, and it is not contended that he did so because the place was dark, the plaintiff has failed to present evidence that negligence of the defendant in not keeping that part of the station light caused her injuries, both because it appears that the place was light enough for the plaintiff to see the skirts of the woman in front of her, and because the pushing of the man behind her, and not the darkness of the station, caused the accident.

LORING, J. The plaintiff's story was that she was pushed off the car platform on to the station floor as she was alighting in Boston. She testified that after reaching the platform of the car she waited until the skirts of a woman in front of her "were off the top stairs so that I could step down," and then as she put one foot down from the car platform to the top step she was pushed off the car. The plaintiff was accompanied by her daughter and her son, and there was evidence that there were some five persons between the mother and the daughter, ten or a dozen between the daughter and the son, and two persons behind the son. There also was evidence that the train stopped before getting fairly into the station and that it was dark at the part of the platform here in question. Further there was evidence that the train in question was crowded when it reached Wyoming where the plaintiff got on, and that that train usually was crowded. Lastly there was evidence that there was a great deal of pushing and jostling among those behind the plaintiff.

The presiding judge * left the case to the jury under the doctrine of Kuhlen v. Boston & Northern Street Railway, 193 Mass. 341, Beverley v. Boston Elevated Railway, 194 Mass. 450, and Glennen v. Boston Elevated Railway, 207 Mass. 497. But although there was evidence that the train in question was usually overcrowded, there was no evidence that on previous occasions the passengers had jostled or pushed each other, and therefore there was no reason why the defendant should have anticipated that the man who did jostle or push the plaintiff would do so. Further than that, the overcrowding had ceased before the accident here in question occurred. On the evidence there were but twenty persons at the most behind the plaintiff. nothing unusual in that. That is what is often the case when a passenger leaves a steam railroad car of the kind in use in this country. The case comes within cases like Willworth v. Boston Elevated Railway, 188 Mass. 220, McCumber v. Boston Elevated Railway, 207 Mass. 559, and Ellinger v. Philadelphia, Wilmington & Baltimore Railroad, 153 Penn. St. 213. In the last case the court said at p. 216: "It is not easy to see how the defendant could have prevented the accident by any system less comprehensive than the one which should require it to escort every

^{*} Hitchcock, J.

incoming passenger from the interior of the car to a place of safety outside its grounds; and every outgoing passenger from its waiting rooms to a seat inside the train. Neither the common law nor the statutes of this State have imposed such a duty on the carrier, and a jury should not be allowed to do it."

The plaintiff was not entitled to go to the jury on the evidence that the place was dark. In the first place, by her own story it was light enough for her to see the skirts of the woman in front of her, and in the second place the cause of the accident was not the darkness of the station but the fact that another passenger jostled or pushed the plaintiff off the car platform. It was not pretended that he jostled or pushed the plaintiff off because it was dark.

The judge should have directed the jury to find a verdict for the defendant as matter of law. The entry therefore should be judgment for the defendant under St. 1909, c. 236.

So ordered.

- F. N. Wier, for the defendant.
- F. P. Garland, (A. W. Shepard with him,) for the plaintiff.

ELIAS BREWER vs. HARRY A. FARNAM & others.

Suffolk. January 27, 1911. — April 8, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Nuisance. Negligence.

If the owner of a building on a city street, who retains control of the roof and of the outside of the building including the "water spout and eaves combined," suffers icicles to form on the conductor pipe, which carries away the water from the gutter of the roof, by reason of a leak in this pipe which is shown to have existed for more than two years, he can be found to be liable to a traveller on the public sidewalk adjoining the building who is injured by such an icicle falling upon him.

Tort for personal injuries alleged to have been sustained by the plaintiff at about half past five o'clock on December 24, 1906, when he was walking along the sidewalk of Sudbury Street in Boston, by reason of an accumulation or mass of ice falling upon him from a defective spout or water conductor negligently maintained and allowed to remain as a nuisance upon a building owned and controlled by the defendants. Writ dated June 18, 1907.

In the Superior Court the case was tried before White, J. The evidence is described in the opinion, where also the rulings of the judge are stated. The jury returned a verdict for the plaintiff in the sum of \$5,000; and the defendants alleged exceptions.

The case was submitted on briefs.

J. Lowell & J. A. Lowell, for the defendants.

F. J. Daggett & F. P. Garland, for the plaintiff.

LORING, J. At the time here in question the plaintiff was walking on the sidewalk in front of the building numbered 20–24 Sudbury Street in the city of Boston and was injured by ice falling on him. There was evidence that this ice came from what is spoken of in the bill of exceptions as the drain pipe, the conductor pipe and the water spout. We understand this to have been an iron pipe on the outside of the building, to carry away the water from the gutter which ran around the outside of the roof; and we shall speak of it as the conductor pipe.

The building numbered 20-24 Sudbury Street was a six story building owned by the defendants. The basement, first and sixth floors were let to one tenant, the fifth floor to another and the third to still another. So far as appears the second and fourth floors were not let. It affirmatively appears from one of the leases put in evidence that the common stairway and freight elevator were to be used in common and so remained in the control of the defendants; and one of the defendants testified that they had charge of making repairs on the roof and the outside of the building including the "water spout and eaves combined."

There was direct evidence from an eyewitness that the ice which fell on the plaintiff consisted of icicles which had formed on the conductor pipe from "dripping down and freezing." And the plaintiff's evidence tended to show that for many years water had escaped from the conductor pipe, had frozen into icicles and had dropped on to the sidewalk. One of the witnesses placed the point at which this occurred at the second story and the VOL. 208.

other at the top of the conductor pipe, apparently where it joined the gutter or a spout leading into it from the gutter.

The presiding judge instructed the jury in substance, "Unless you find that the defendants did not exercise reasonable care in reference to the condition of the conductor or to the accumulation of ice upon or near the conductor, the plaintiff cannot recover," and refused to rule that "the defendants not having received any notice of any defect in the condition of the conductor are not liable in this action," and to direct a verdict for the defendants.

In support of their contention that the ruling asked for should have been given, the defendants rely on *Hutchinson* v. *Cummings*, 156 Mass. 329. That was a case where the whole building passed into the control of the tenant to whom the whole of it was leased, and where the lessor had agreed to make repairs. What was decided in *Hutchinson* v. *Cummings* was that in such a case there is no default on the part of the lessor in not making repairs until he receives notice from the lessee that repairs are needed. In the case at bar the conductor pipe remained in the control of the defendants.

In support of their contention that the presiding judge as matter of law should have directed the jury to find a verdict for them, the defendants rely on the rule discussed in *Davis* v. *Rich*, 180 Mass. 235. One of the plaintiff's witnesses did testify that he had seen the water spouting out and freezing for a week or two before the accident. But this witness did not testify that this condition of things existed only during the week or two before the accident. And if he had it would not have justified the defendant's contention for there was another witness who testified to its existence for two years before the accident. In other words the case made out by the plaintiff in this action was not or could have been found not to be the case of a recent break in the pipe.

The entry must be

Exceptions overruled.

MARY L. LAFOND, administratrix, vs. Boston and Maine Railroad.

Middlesex. March 7, 1911. — April 8, 1911.

Present: Knowlton, C. J., Hammond, Bralley, Sheldon, & Rugg, JJ.

Railroad, Liability for injury or death at grade crossing. Negligence, Gross. Evidence, Presumptions and burden of proof, Relevancy and materiality.

In an action by an administrator against a railroad corporation under St. 1906, c. 463, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by the neglect of the defendant to give the signals required by § 147 of the same chapter, if it appears that the signals were not given and that the failure to give them contributed to the happening of the accident, the plaintiff is entitled to recover, unless the defendant sustains the burden of showing that the intestate, in addition to a mere want of ordinary care, was guilty of gross or wilful negligence or a violation of law which contributed to the injury.

It is seldom that a presiding judge can rule as matter of law that a material fact has been proved affirmatively, and, in an action by an administrator against a railroad corporation under St. 1906, c. 463, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by the neglect of the defendant to give the signals required by § 147 of the same chapter, facts on which the jury could find that the intestate was guilty of gross negligence do not for that reason justify the presiding judge in ruling that the defendant as matter of law has proved gross negligence of the intestate.

In an action by an administrator against a railroad corporation under St. 1906, c. 468, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by neglect of the defendant to give the signals required by § 147 of the same chapter, there was evidence that the signals were not given and that the failure to give them contributed to the happening of the accident. It appeared that the intestate, who was a little deaf, had alighted from a local train of the defendant at a station of the defendant, near which he lived, and that, passing behind the train from which he had alighted, he proceeded to cross the parallel tracks at the crossing on his way home, walking in the line of the sidewalk which was intercepted by the crossing, when he was struck and killed by an inbound express train on the third track. The gates were down, but the intestate was inside of them and it was not shown that he was aware of their position. There was evidence that, if he did know it, he had reason to suppose that the gates were kept closed merely because the rear of the train from which he had alighted extended over a part of the plank walk in the line of the sidewalk. There also was evidence on which the jury could have found, that there was an established practice of the defendant not to have an express train go past the station while a local train was discharging passengers, and that the intestate from his familiarity with the locality knew of this practice. It also could have been found that before stepping on the track the intestate had passed a gateman, who was just outside the gates, and had received no warning or intimation of danger. It did not appear that the intestate then saw the express train approaching. It appeared that when the intestate was about to step on the track of the express train his attention was attracted by shouts from the gateman and the bystanders, that he then turned around and started back, but became confused, turned again and walked toward the express train and was struck and killed. It might have been found that, but for his pausing and turning around and his bewilderment and confusion caused by the shouts, the intestate would have crossed in safety. Held, that it could not be ruled as matter of law that the defendant had shown that the plaintiff's intestate was guilty of gross negligence, and that the case was for the jury.

In an action against a railroad corporation under St. 1906, c. 468, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by neglect of the defendant to give the signals required by § 147 of the same chapter, if it appears that the intestate had alighted from a local train of the defendant at a station of the defendant, near which he lived, and that he proceeded to cross the parallel tracks at the station on his way home, when he was struck and killed by an inbound express train on the third track, and the defendant contends that the plaintiff cannot recover because it is shown that his intestate was guilty of gross negligence, evidence, that there was an established practice of the defendant, of which the intestate from his long familiarity with the locality might have been found to have had knowledge, that no express train should go past the station while a local train was discharging passengers there, is admissible as tending to show the absence of gross negligence on the part of the intestate.

TORT brought by the administratrix of the estate of Joseph I. LaFond, late of Cambridge, for the death of her husband, the intestate, who was instantly killed by a train of the defendant at the railroad station of the defendant in that part of Cambridge called West Cambridge on October 9, 1909. Writ dated November 13, 1909.

The first and second counts of the declaration were under St. 1907, c. 892. Afterwards, by amendment, the plaintiff added a third count under St. 1906, c. 463, Part II. § 245, alleging neglect in approaching the grade crossing to give the signals required by § 147 of the same chapter. The section thus declared upon is as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and forty-seven, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section sixty-three of Part I. or, if the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

In the Superior Court the case was tried before Fox, J. There was evidence tending to show the following facts:

LaFond had lived near the West Cambridge station for about twenty years. He had worked in Boston during that time and had gone into Boston and had come out from Boston every day by way of the West Cambridge station. He was a little deaf. Sometimes a person speaking to him would have to speak more than once. At other times he would hear what was said at once. On the night of the accident he took a train leaving the North Union Station at Boston at twenty minutes past seven in the evening. This train was due to arrive at West Cambridge at 7.34 P. M. and it arrived there at about that time. was in the smoker, which was next to the engine, and there were three passenger coaches following the smoker. When the train reached the West Cambridge station, LaFond got off on the right hand side and walked back alongside the train until he reached the rear end of the last car. He walked around the end of this car and across the track on which the train was standing, across another track and up to or on to the third track. The train on which he came out was the "Outward Local." He crossed the "Outward Local" track in the rear of the train which he had left, walking about in line with the sidewalk. He also crossed the track of the "Outward Express," still in line with the sidewalk, and had come up to or on to the third track, which was that of the "Inward Express."

The local train, on which LaFond was a passenger, stopped so that the rear end of it projected over the sidewalk line from three to four feet. Both gates were lowered before the local train passed across the street, and remained down at the time LaFond was struck. There was no gate and no obstruction of any kind between the main gate and the side of the car. There was a space there of a little over five feet, through which LaFond walked before turning to his right to cross the track. There was no evidence that he saw the position of the gates or knew that they were lowered.

The train which struck and killed LaFond was coming in the opposite direction on the "Inward Express" track. It was going at a rate of thirty-five or forty miles an hour. There was evidence from which the jury would have been warranted in finding that the bell on the engine of the express train was not rung and that the whistle was not sounded as required by St. 1906, c. 463, Part II. § 147, and that the failure to do this contributed to the killing of the intestate.

The gateman employed by the defendant at this crossing was standing near the handles of the gate and just outside the gate, talking with one Thompson and one Vanasse when LaFond walked by them. The gateman gave no signal or warning to LaFond that a train was approaching until LaFond was out as far as the "Outward Express" track, or between that track and the "Inward Express" track, when the gateman and several others began "hollering to him." At about that time Thompson ran out between the outward and inward express tracks, seeking to grab hold of LaFond and get him out of danger. When the "hollering" began LaFond turned around and started back, and, apparently confused as to the track on which the train was. turned around again and started toward the track on which the express train was coming. It appeared that two other passengers besides LaFond started to walk across the tracks and were stopped on the outward express track by the "hollering."

Apart from the gong in the gateman's shanty, which announced the approach of the express train and which indicated nothing to persons unfamiliar with the crossing, none of the witnesses were aware of the approach of the express train until the "hollering" began. At that time the express train was about opposite the station, eighty or one hundred feet from the crossing.

The local train on which LaFond had come from Boston had not started at the time he passed behind the rear end of it, but it did start at just about that time, and it had gone along far enough to enable the witnesses standing on the crossing near the gateman to see LaFond while he was between the inward and outward express tracks, and at the same time see the express train opposite the West Cambridge station seventy-five or eighty feet away. There was no evidence as to whether or not LaFond looked toward the west as he passed back of the local train.

The evidence was that while he was at a point either between the express tracks, or on the outward express track, his attention was attracted by the "hollering"; that he then turned around and started back, apparently going to escape being hit by the train, when he became confused, turned again and walked toward the express train and was struck either by the cylinder head or by the step. He was turning at the instant he was struck and was facing toward Boston.

The practice with reference to raising and lowering the gates at that time was to lower the gates before a train reached the crossing and to keep them down so long as any portion of the train extended over the street or any part of the planking.

There was in evidence a rule of the defendant requiring trainmen to use caution in passing a train receiving or discharging passengers at a station. There also was evidence tending to show that it had been the practice for many years not to drive a train past this station without stopping while another train was receiving or delivering passengers, and that before and up to June, 1909, the rules of the defendant required all trains to stop.

The following rule of the defendant, which was in force at the time of the accident, was offered and admitted in evidence, subject to the exception of the defendant:

"D-153 (Double track). Trains must use caution in passing a train receiving or discharging passengers at a station and must not pass between it and the platform at which the passengers are being received or discharged." The plaintiff offered in evidence the following rule in force before and up to June, 1909, and not afterward: "Great care must be used by the enginemen and trainmen of a train approaching a station where a train is receiving or discharging passengers, and in no case draw up to or pass a station where a train is standing, taking or leaving passengers. Station agents will immediately report to the superintendent any violation of this rule."

The plaintiff also offered in evidence the following rule for enginemen and firemen which was in force before and up to June, 1909, and not afterwards: "Approach stations carefully to avoid any risk of accident and in no case draw up to or pass a station where a train is taking or leaving passengers."

The judge excluded the rules, and the plaintiff excepted.

At the close of the plaintiff's evidence, the defendant asked the judge to order a verdict for the defendant on the ground that there was not sufficient evidence to warrant a verdict for the plaintiff. The judge thereupon ordered a verdict for the defendant, subject to the plaintiff's exception, and by agreement of the parties reported the case to this court for determination. It was agreed that all evidence admitted or excluded subject to exception might be considered by this court so far as it was competent. If the ruling of the judge ordering a verdict for the defendant was right, judgment was to be entered for the defendant. If his ruling was wrong and the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$2,000.

F. E. Bradbury, for the plaintiff.

F. N. Wier, (L. T. Trull with him,) for the defendant.

SHELDON, J. The defendant admits that there was evidence which would have justified a finding that the bell was not rung and the whistle was not sounded upon the engine of the train which struck and killed the plaintiff's intestate. St. 1906, c. 463, Part II. §§ 147, 245. The jury could have found that the failure to give these signals contributed to the happening of the accident, even though the intestate was somewhat deaf. Doyle v. Boston & Albany Railroad, 145 Mass. 886. Walsh v. Boston A Maine Railroad, 171 Mass. 52, 58. Brusseau v. New York, New Haven, & Hartford Railroad, 187 Mass. 84. Upon these findings the plaintiff would be entitled to recover, unless the defendant sustained the burden of showing that the intestate, in addition to a mere want of ordinary care, was guilty of gross or wilful negligence which contributed to his injury, there being no contention that he was acting in violation of the law. Manley v. Boston & Maine Railroad, 159 Mass. 493. Walsh v. Boston & Maine Railroad, 171 Mass. 52. Phelps v. New England Railroad, 172 Mass. 98. McDonald v. New York Central & Hudson River Railroad, 186 Mass. 474.

As has been pointed out by this court, it is not often, in the absence of binding admissions or agreements as to facts, that a court can rule as matter of law that a material fact has been affirmatively proved. Kelsall v. New York, New Haven, & Hartford Railroad, 196 Mass. 554. Kenny v. Boston & Maine Rail-

road, 188 Mass. 127. Brusseau v. New York, New Haven, & Hartford Railroad, 187 Mass. 84. In the first of these cases this rule was declared, and it was shown that the decisions in Debbins v. Old Colony Railroad, 154 Mass. 402, and Emery v. Boston & Maine Railroad, 173 Mass. 136, cannot be regarded as at variance with it. See also Slattery v. New York, New Haven, & Hartford Railroad, 208 Mass. 453.

In the case at bar, as in others of the cases cited, the jury no doubt could have found that the intestate was guilty of gross negligence; but we cannot say that this was made out as matter of law. It is true that the gates were down when he started to cross the tracks, but the line of his approach was inside that of the gates, and it was not shown that he was aware of their position. If he did know it, he might have supposed that the gates were closed merely on account of the arrival of the train which he had just left, and were kept closed until that train should have departed, as the gateman testified would be done when a train extended (as this one did) over a part of the plank walk. The jury could have found also that there was an established practice on the part of the defendant not to have an express train go past the station while a local train was discharging passengers, and that the intestate from his long familiarity with the locality knew of this practice. This evidence was excepted to by the defendant; but it was competent, not only as to the defendant's negligence, but also upon the issue of his care. Floytrup v. Boston & Maine Railroad, 163 Mass. 152. The jury might have found the custom to have been a practical construction of the defendant's rule which was in evidence, on which the intestate had a right to rely. Santore v. New York Central & Hudson River Railroad, 203 Mass. 487, 444. That differentiates the case at bar from Connolly v. New York & New England Railroad, 158 Mass. 8. The fact which also could be found that he had passed by the gateman, who was just outside the gate, before stepping upon the track without then receiving any warning or intimation of danger had, in connection with the other evidence, a bearing upon the issue of his gross negligence. It did not appear that he then saw the express train approaching, and the circumstances which we have mentioned might have influenced his conduct. Even if he had seen it, he might, perhaps not without negligence but still without a necessary inference of gross negligence, have formed a judgment that he could safely cross before it should have reached him. Indeed, it might have been found that but for the pausing and turning around more than once and the bewilderment and confusion caused by the well intended shouts of the bystanders and the gateman, he would have crossed in safety. It is not shown that he was guilty of gross negligence in starting to cross the track.

Nor can we say that his conduct in pausing, turning around and then continuing his attempt to cross is conclusive against him. In the immediate exigency and the distraction caused by the shouts behind him and the dazzling light of the locomotive and the roar of the train, it cannot be said as matter of law that either an instinctive movement forward or a sudden determination to go on was conclusive evidence of gross negligence. Copley v. New Haven & Northampton Co. 186 Mass. 6. Sullivan v. New York, New Haven, & Hartford Railroad, 154 Mass. 524, 528. Manley v. Boston & Maine Railroad, 159 Mass. 498. Walsh v. Boston & Maine Railroad, 171 Mass. 52. Phelps v. New England Railroad, 172 Mass. 98. McDonald v. New York Central & Hudson River Railroad, 186 Mass. 474.

We need not consider whether the plaintiff made out any case under the other counts of her declaration. Under the terms of the report, judgment must be entered in her favor upon the third count for the sum of \$2,000.

So ordered.

CATHERINE A. McIlboy vs. John V. McIlboy, & trustee.

Suffolk. March 9, 1911. — April 3, 1911.

Present: Knowlton, C. J., Hammond, Braley, Sheldon, & Rugg, JJ.

Husband and Wife. Separate Support. Probate Court. Superior Court. Practice, Civil, Reservation by report. Attachment, Dissolved by death. Trustee Process.

An order made by a judge of the Probate Court under R. L. c. 158, § 38, that a husband shall pay a certain sum of money monthly to his wife for her support, and an order made under § 35 of that chapter and R. L. c. 152, § 31, that execution shall issue for the enforcement of the order for support, are not terminated

or suspended in their operation by the resumption by the wife of cohabitation with her husband.

Although an order under R. L. c. 153, § 33, that a husband shall pay a certain sum of money monthly to his wife for her support, terminates in operation at the husband's death, yet it can be enforced against the husband's estate for arrears which accrued during his lifetime, and for this purpose the obligation is regarded as a debt of record established by a judgment.

Upon a petition to the Probate Court under R. L. c. 153, § 35, and c. 152, § 31, to enforce a previous order of that court, that a husband shall pay a certain sum of money monthly to his wife for her support, the judge of the Probate Court can consider any change in the position of the parties and any facts that have come into existence since the making of the first order, and, if he finds that justice so requires, he can order execution to issue for only a part of the unpaid arrears of the payments for support.

Upon an appeal to the Superior Court from an order made by a judge of the Probate Court for the enforcement by execution of a previous order of the Probate Court that a husband shall pay a certain sum of money monthly for the support of his wife, the Superior Court has the same power to reduce the required payments on account of a change of circumstances that the Probate Court had.

A stipulation in the report of a case reported by a judge of the Superior Court for determination by this court, that such order may be entered "as the court deems just," means that such an order shall be entered as this court find to be required by law.

The provision of R. L. c. 167, § 112, that "an attachment of real or personal property shall be dissolved if the debtor dies before it is taken or seized on execution and administration of his estate is granted in this Commonwealth upon an application therefor made within one year after his decease," applies to an attachment made by trustee process upon property alleged to have been fraudulently conveyed or concealed upon a petition for an execution to enforce a decree for alimony.

APPEAL to the Superior Court from a decree of the Probate Court for the county of Suffolk, dated April 20, 1909, ordering that the Chelsea Savings Bank be charged as trustee of the respondent in the sum of \$805.69 and that an execution issue for the sum of \$990, as the arrears due to the petitioner for her separate support under a former decree of that court dated April 21, 1892.

In the Superior Court the case was heard by Bell, J., without a jury. He found the following facts:

The parties were married to each other in July, 1891, and thereafter lived together until the following September, when they separated and remained apart until October, 1899. In November, 1891, the petitioner filed in the Suffolk Probate Court a petition for her separate support, and on April 21, 1892, obtained a decree that she was living apart from the respondent for justifiable cause and ordering him to pay to her for her sepa-

rate support the sum of \$5 per month, beginning with the first Monday of March, 1892. In October, 1898, the respondent brought a libel for divorce against the petitioner in the Suffolk Superior Court, alleging desertion and cruel and abusive treatment. In November, 1899, while this libel was still pending and shortly before it was to be heard, the parties met, became reconciled, resumed their marital relations, and the libel was dismissed on November 10, 1899, at the request of the libellant and without a hearing thereon. From November, 1899, until May, 1900, the parties lived together as man and wife. The petitioner offered evidence, which was admitted subject to the respondent's exception, that the respondent finally deserted the petitioner in May, 1900, and that they have lived apart from each other ever since. On this evidence, subject to the exception, the judge so found.

The judge further found that the petitioner never brought against the respondent any new or other proceedings for a judicial separation, separate support or otherwise except those above described; that the parties have lived in this Commonwealth ever since their marriage; that the respondent has never made a payment to the petitioner under the decree of April 21, 1892; and that the petitioner has never sought to enforce that decree with the exception of the present proceedings.

The present proceedings were begun by a petition filed in the Suffolk Probate Court dated February 28, 1909, praying that the Chelsea Savings Bank be charged as trustee of the respondent and that an execution issue in favor of the petitioner for the sum of \$1,020, as the amount remaining due and unpaid under her said decree. This petition was heard by *Grant*, J., who by the decree of April 20, 1909, ordered that the Chelsea Savings Bank be charged as trustee of the respondent in the sum of \$805.69, and that execution should issue in favor of the petitioner in the sum of \$990, that being the entire amount claimed by her from the first Monday of March, 1892, to the first Monday of March, 1909, a period of seventeen years, less the sum of \$30 deducted for the interval of six months covered by the second cohabitation of the parties. It was from this decree that the respondent appealed to the Superior Court.

The judge of the Superior Court also found that during the

pendency of the appeal in the Superior Court the respondent died on or about April 14, 1910, and that David J. Maloney had been appointed administrator of his estate, and had duly qualified and had appeared in this proceeding.

The respondent [apparently as represented by the administrator of his estate] asked the judge to make the following rulings:

- "1. Said decree of April 21, 1892, changed the status of the petitioner from a wife living with her husband to a wife living apart from him for justifiable cause. Separate support was an incident merely to her changed status and continued only during the existence of such status. When she returned to live with him her former status was restored and her right to separate support was lost.
- "2. Said decree was an entirety and cannot by the act of the parties be so divided that the petitioner can have thereunder separate support without cohabitation a part of the time, cohabitation without separate support some of the time, and then separate support without cohabitation the rest of the time.
- "8. The reconciliation of the parties and the voluntary resumption of their marital relations was a condonation and forgiveness by the petitioner of the justifiable cause for which she was living apart from the respondent.
- "4. Such voluntary cohabitation was a waiver of the right of the petitioner to enforce payment of any arrears then due under said decree.
- "5. Said voluntary cohabitation avoided said decree and was a bar to the accumulation and recovery of further arrears thereunder.
- "6. Said decree was not suspended merely during the period of cohabitation to be revived automatically upon his subsequent desertion.
- "7. To entitle the petitioner to recover for separate support for any cause occurring during or after said period of cohabitation she should have brought new proceedings therefor and established the same by sufficient evidence of a new and justifiable cause of her living apart from him.
- "8. Evidence of the respondent's desertion in May, 1900, was inadmissible to revive said decree, or to enable the petitioner to recover thereunder for any arrears due at the beginning of said cohabitation or after its termination.

- "9. No such proceedings having been brought, evidence that the respondent finally deserted the petitioner in May, 1900, was improperly admitted and should have been excluded.
- "10. The arrears for separate support due under said decree, if any, at the beginning of said cohabitation do not survive the death of the respondent.
- "11. Arrears for separate support accruing under said decree after the termination of said cohabitation, if any, do not survive the death of the respondent.
- "12. The neglect of the petitioner for a period of more than fifteen years to take action to enforce said decree, under the facts set forth in this report, shall be deemed laches sufficient to bar her enforcement of said decree.
- "13. The Probate Court has no authority to charge the Chelsea Savings Bank as trustee of the respondent when it appears that the funds in its hands stand in the name of the respondent as trustee of a third person.
- "14. Upon the facts set forth in the report the petitioner is not entitled to recover."

The judge refused to make any of these rulings and made an order affirming the decree of the Probate Court. At the request of the respondent, he reported the case for determination by this court. If the rulings or any of them should have been given, the decree of April 20, 1909, was to be modified or reversed in accordance therewith; otherwise, it was to be affirmed or such other order was to be made "as the court deems just."

- W. P. Holcombe, for the respondent.
- W. J. Williams, for the petitioner.

SHELDON, J. It is not denied that the Probate Court had the power under the provisions of R. L. c. 158, § 83, to make its order for the payment by the respondent of a monthly sum to the petitioner his wife; and § 35 of the same chapter, by reference to R. L. c. 152, § 81, authorizes that court to issue execution for the enforcement of its order. But the respondent contends that the order was annulled and avoided, or at the least that it was made incapable of enforcement, without any further order of the court, by the act of the petitioner in resuming cohabitation with her husband.

As this statute merely provides "a new method of enforcing

a right growing out of marriage, which was enforced by an order for alimony after a divorce from the bonds of matrimony, or a divorce from bed and board, or after the commencement of proceedings to obtain a divorce" (Bucknam v. Bucknam, 176 Mass. 229, 280), it may be assumed that the same rules which govern an order for alimony made by a divorce court are to be applied to the original order of the Probate Court which was the foundation of this proceeding. There is authority in some jurisdictions for the contention that a reconciliation of husband and wife after a decree for a judicial separation and for the payment of alimony will of itself annul the decree so that a claim for alimony no longer can be supported, even after a subsequent separation, without a new order having been obtained upon a new suit. Tiffin v. Tiffin, 2 Binn. 202. Succession of Liddell, 22 La. Ann. 9. And see the cases collected in 9 Am. & Eng. Encyc. of Law, (2d ed.) 852.

But the practice in England arose from the form of the decree, which provided for a separation until the parties should have become reconciled, and was continued in some of our States under the language of statutes which were construed to fix the same limit. See the opinion of Vice Chancellor Green in Jones v. Jones, 29 Atl. Rep. 502, containing an elaborate discussion of the question. In States in which no such limit has been fixed but provision has been made by statute for further action by the courts and the revision or modification of such a decree upon the application of one or both of the parties, it has been held, in accordance with what seems to us to be the sound reason, that the decree is not annulled, either permanently or temporarily, by the reconciliation or renewed cohabitation of the parties or by the act of one of them in condoning the misconduct of the other, but that these circumstances, like any other change in the situation of the parties, simply afford ground for new action of the court, by annulling, revising or altering its former order as justice may require. This was so held in New Jersey in the case of Jones v. Jones, ubi supra, and again in New York, in renewed litigation between the same parties, in Jones v. Jones, 90 Hun, 414. The same rule was declared in Hobby v. Hobby, 5 App. Div. (N. Y.) 496, citing and following the cases just referred to. It was acted on by this court in Albee v. Wyman, 10 Gray, 222, 229, and in California in Wade v. Wade, 31 Pac. Rep. 258, in which cases it was held, not that the second marriage of the wife or the return to cohabitation of the separated couple of itself annulled the decree for alimony, but that these facts warranted the court in revoking and refusing to enforce the previous decree.

This rule must govern the case at bar. The statute expressly provides that the court after having made its order, "may from time to time" upon application of either party "revise or alter such order or make a new order or decree" as circumstances may require. The manifest intention of the Legislature was that the order should not be vague and indefinite in its duration, liable to be abrogated or annulled by the mere act of the parties, and to be upheld or overthrown as parol evidence might establish or fail to establish conduct of the parties more or less inconsistent with the grounds upon which it was based, but that the order once made should continue in force until revised or altered by the court itself upon proper application and after due hearing. Allen v. Allen, 100 Mass. 373, 374, 376. Graves v. Graves, 108 Mass. 314, 321. Sparhawk v. Sparhawk, 120 Mass. 390. Southworth v. Treadwell, 168 Mass. 511.

The right of the wife to enforce this order was not permanently taken away by her return to her husband. The order might have been made though she never had left his house. Bucknam v. Bucknam, 176 Mass. 229. We do not know upon what findings of fact the order was based. But it follows from the decision just cited that her right to obtain and to enforce the order was not necessarily destroyed by the fact that she had returned to his home. It is immaterial here that suits between husband and wife are not authorized by R. L. c. 153, § 6.

While this order for the support of the wife would cease at her death, it can be enforced against the husband's estate after his death for arrears incurred during his lifetime. It is for this purpose regarded as a debt of record established by a judgment. Knapp v. Knapp, 134 Mass. 858. The liability for unpaid alimony may not, strictly speaking, be a debt within the legal meaning of that word. Allen v. Allen, 100 Mass. 878. Chase v. Ingalls, 97 Mass. 524. Barclay v. Barclay, 184 Ill. 875. In re Nowell, 99 Fed. Rep. 981. Audubon v. Shufeldt, 181 U. S. 575, 577, cited and approved in Leyland v. Leyland, 186 Mass. 420,

421. But it gives to the wife in proceedings like this the right as a creditor to enforce payment in the same manner and to as great an extent as if she were a creditor in the most exact sense of that word. Chase v. Chase, 105 Mass. 885. Purdon v. Blinn, 192 Mass. 887. Shepherd v. Shepherd, 196 Mass. 179. Hill v. Hill, 196 Mass. 509. Upon this petition, addressed to the court which made the original order, that court could consider any change in the present position of the parties and any facts that had occurred since the making of the first order, and if it found that justice so required, could order execution to issue for only a part of the unpaid arrears. Knapp v. Knapp, 134 Mass. 853, 857. It was doubtless upon this ground, and not, as the respondent has contended, upon any theory that the operation of the order had been suspended while the parties lived together, that the Probate Court based its conclusion as to the amount named in the order appealed from; and this as a matter of law was correct. And the Superior Court upon the appeal had the same power as the Probate Court. Smith v. Smith, 184 Mass. 394.

It follows that the rulings requested by the respondent were rightly refused. They were all either wrong as matter of law or wholly immaterial to the case on trial.

But under the terms of the report such order is now to be made as to the court seems just, which means of course such order as we find now to be required by law. One circumstance appears in the report which, although it has not been argued by the counsel, we do not feel at liberty to disregard.

During the pendency of the appeal, on or about April 14, 1910, the respondent died, and an administrator of his estate was appointed, who has appeared and defended the case. It is provided by R. L. c. 167, § 112, that any "attachment of real or personal property shall be dissolved if the debtor dies before it is taken or seized on execution and administration of his estate is granted in this Commonwealth upon an application therefor made within one year after his decease." It sufficiently appears from the date stated that the application for administration must have been made within a year after the death. Therefore the attachment, though made by trustee process and though it seems to have been made upon property alleged to have been you. 208.

fraudulently conveyed or concealed by the respondent, was dissolved. Parsons v. Merrill, 5 Met. 856. Wilmarth v. Richmond, 11 Cush. 468. Dunbar v. Kelly, 189 Mass. 890. Newburyport Institution for Savings v. Puffer, 201 Mass. 41.

The decree of the Probate Court must be modified by striking out that part of it by which the Chelsea Savings Bank was charged as the trustee of the respondent, and so modified must be affirmed.

So ordered.

LOUIS A. HOLMAN vs. DANIEL B. UPDIKE.

Norfolk. January 10, 1911. — April 4, 1911.

Present: Knowlton, C. J., Loring, Braley, Sheldon, & Rugg, JJ.

Election. Contract, Performance and breach, Rescission.

In an action to recover \$120 as the price or compensation for a series of six pencil drawings to be used as illustrations in a book to be published by the defendant, it appeared that there was an entire contract for the six drawings for the round price named, that when the plaintiff had completed five drawings and had done a part of the sixth, he showed them to the defendant who expressed dissatisfaction and said "that he would not accept the drawings as they were," that the plaintiff proceeded to finish the sixth drawing and then brought an action, previous to the present one, for the contract price, that in that action a judge, who heard the case without a jury, found for the defendant and a general judgment for the defendant was entered, that thereafter the plaintiff brought the present action in which he sought to recover damages on the ground that the defendant had repudiated the contract by ordering the plaintiff to cease work before the sixth drawing was completed and that this gave the plaintiff the right to rescind the contract and recover on a quantum meruit the value of his services. Held, that the plaintiff by bringing his first action had made a conclusive election of remedy by affirming the contract and suing on it for the contract price, and that, having failed to prove performance, it was too late for him to take the ground that complete performance on his part was not necessary because the defendant's repudiation of the contract had given the plaintiff the right to rescind it and recover for the value of his services. Whether on other pleadings the plaintiff could have recovered damages for the defendant's alleged repudiation of the contract was not considered.

CONTRACT for \$120 as the price or compensation for six pencil drawings prepared by the plaintiff from certain photographs furnished by the defendant, with a count to recover \$39 for other services. Writ dated February 8, 1909.



The first count was on a special oral contract alleged to have been made on or about December 10, 1906, and alleged that in pursuance of the contract the plaintiff proceeded to prepare the drawings, that he prepared and finished five of them, and had about three fourths completed the sixth drawing, when the defendant ordered the plaintiff to cease work thereon; that the plaintiff on or about March 19, 1907, tendered the drawings to the defendant and demanded payment therefor, but that the defendant refused to receive the drawings and refused to pay the plaintiff the price which he was to receive under the contract or any part thereof.

The second count was upon an account annexed with an item of \$120 for work done on March 19, 1907, on six pencil drawings and was alleged to be for the same cause of action as the first count, with a second item of \$4.52 for interest from March 19, 1907.

The third count contained, besides an item for interest, three items as follows:

1.	December 17, 1906, To expert opinion in regard to	
	photographs	\$ 10
2.	January 29, 1907, To photography at Wickford, R. I.,	
	one day	25
8.	March 6, To eight photographs of Goddard House	4
		\$39

The third item of the third count was waived by the plaintiff. The defendant's answer, in addition to a general denial, alleged that the plaintiff brought an action in the Municipal Court of the City of Boston for identically the same cause of action set forth in the declaration in the present action, that the former action was tried in the Municipal Court of the City of Boston, and on the defendant's appeal was tried again in the Superior Court, in which court *Fessenden*, J., made a finding in favor of the defendant; that on this finding a general judgment had been entered in the Superior Court before the date of the writ in the present action, which judgment had never been vacated but was in full force and effect at the date of the writ, and that therefore the present action could not be maintained.

In the Superior Court the case was tried before Bell, J. The plaintiff was the only witness and the facts shown by his testimony are stated in the opinion. On cross-examination the plaintiff and his counsel admitted that the drawings in the former action referred to in the answer and the parties to that action were identically the same as in the case at bar. The defendant then introduced in evidence the pleadings in the original action and the certificate of judgment for the defendant in that action. No question was raised as to the proper certification of the copies of the declaration and answer and certificate of judgment thus introduced on behalf of the defendant. The plaintiff's declaration in the former action was as follows:

"And the plaintiff says the defendant owes him \$124 according to the account hereto annexed."

The account annexed was as follows:

" Needham, March 19, 1907.

" N	fr. Daniel B. Updike,	
	To Louis A. Holman,	Dr.
1.	To six pencil drawings to illustrate Updike's His-	
	tory of the Narragansett Church	\$120.00
2.	To eight photographs of the Goddard House	4.00
8.	Total	\$124.00

"Count 2. And the plaintiff says that on or about the tenth day of December, 1906, the plaintiff and the defendant entered into an oral contract, by the terms of which the plaintiff was to prepare for the defendant six pencil drawings from such photographs as the defendant should select, for each of which drawings the defendant was to pay the plaintiff the sum of twenty dollars; that thereafter the defendant selected six photographs, and the plaintiff prepared and delivered to the defendant six drawings therefrom in accordance with the terms of said contract; that thereafter, to wit, on or about the nineteenth day of March, 1907, the plaintiff demanded of the defendant the sum of one hundred twenty dollars, the price agreed upon as aforesaid, but the defendant neglected and refused, and still neglects and refuses, to pay said sum to the plaintiff. Wherefore the defendant owes the plaintiff said sum of \$120.

"Count 2 aforesaid and Item 1 of the first count are for one and the same cause of action."

The defendant asked the judge to make the following rulings:

- 1. The plaintiff cannot recover on the first count of his declaration.
- 2. The plaintiff cannot recover on the second count of his declaration.
- 8. The plaintiff cannot recover on the third count of his declaration.
- 4. The plaintiff cannot recover for the first item in the account annexed to the second count of his declaration.
- 5. The plaintiff cannot recover for the second item in the account annexed to the second count of his declaration.
- 6. As to the first count of the plaintiff's declaration the matter therein contained is *res judicata* and the plaintiff cannot recover.
- 7. As to the second count of the plaintiff's declaration the matter therein contained is *res judicata* and the plaintiff cannot recover.
- 8. As to the third count of the plaintiff's declaration the matter therein contained is *res judicata* and the plaintiff cannot recover.
- 9. Where a person has brought an action for work done or for goods sold and delivered, and that action has gone to judgment, it is not open to the plaintiff thereafter to bring a new action, state his case in a different form, and in this manner avoid the effect of the former judgment.
- 10. As to all the matters contained in the plaintiff's declaration there has been a former adjudication and the plaintiff cannot recover.

The judge refused to make any of these rulings except the ninth on the ground that the defendant was entitled to none of them. He refused to make the ninth on the ground that it was inapplicable to the present case.

The judge submitted the case to the jury who returned a verdict for the plaintiff in the sum of \$184. The defendant alleged exceptions to the refusal of the rulings requested and also to such parts of the charge as might be inconsistent with those

rulings and to a certain illustration used by the judge in a part of his charge.

H. D. McLellan, (S. C. Bennett with him,) for the defendant. C. E. Allen, (W. G. Moseley with him,) for the plaintiff.

BRALEY, J. The case at bar is the second action between the parties, to ascertain their rights under a contract, whereby the plaintiff undertook to prepare and furnish for a round sum a set of six drawings or illustrations to embellish a church history which the defendant intended to republish. It was uncontroverted at the trial, where the plaintiff was the only witness, that when five of the six drawings had been finished and the sixth partially completed, the defendant having expressed dissatisfaction with the character of the work, said "that he would not accept the drawings as they were." A dispute followed as to whether the completed drawings in workmanship and details complied with the contract, but the plaintiff, who then presented a bill at the rate of \$20 for each drawing, does not appear to have pressed the claim. The refusal of the defendant is alleged in the declaration in the present case to have been an order "to cease work thereon," or a repudiation of the contract, which justified rescission by the plaintiff. It would seem to be plain, that the contract was to do specific work for an entire sum, and could not be split into six parts without the defendant's consent, who was under no obligation to accept five drawings and pay for them, even if they corresponded with previous drawings of the plaintiff which the evidence shows the parties selected as the standard of workmanship. Fullam v. Wright & Colton Wire Cloth Co. 196 Mass. 474. Badger v. Titcomb, 15 Pick. 409, 418. Gibson v. Cooke, 20 Pick. 15.

The performance of the work was a condition precedent to payment, and unless the defendant acted in bad faith, and intended to take the position that, even if the set were completed as required by the contract, he would not accept, the plaintiff could not rescind. Daley v. People's Building, Loan & Saving Association, 178 Mass. 18, 18. The plaintiff, moreover, apparently did not so interpret the defendant's language or consider that he had been prevented from performance, or treat the contract as ended, for he went on and finished the sixth drawing, when he tendered the full set with a bill for the contract price,

which the defendant refused, because, as he then said, "he did not consider the drawings of such a character that he ought to accept them." It seems from the instructions to have been assumed at the trial that the defendant's conduct was equivocal and that the jury could find that the plaintiff was justified in treating the contract as repudiated by the defendant at some stage of performance, and that, if they so found, the plaintiff having rescinded, could recover. See *Barrie* v. *Quinby*, 206 Mass. 259.

But whichever position the plaintiff took, he cannot maintain his present action as to the principal controversy. If the agreement had been fully performed on the plaintiff's part, the defendant owed the contract price, which could be recovered under a count upon an account annexed, or the plaintiff might declare on the special contract, averring his performance and that the compensation agreed upon was payable, or, if the defendant ordered him to cease work and he elected to rescind, then he might sue for the value of his labor and materials. Knight v. New England Worsted Co. 2 Cush. 271, 289. Harrington v. Baker, 15 Gray, 538. Mullaly v. Austin, 97 Mass. 30. Fish v. Gates, 133 Mass. 441. Bowen v. Kimbell, 208 Mass. 364.

It is contended by the plaintiff that in the first action he rested his right of recovery solely on the ground that having fully performed he was entitled to the contract price. If, without deciding, it is assumed that the plaintiff's view of the pleadings is correct, the judgment for the defendant which followed after a trial on the merits must be treated as having conclusively settled that as between the parties and their privies the plaintiff failed to prove full performance on his part. In the present action the plaintiff treats the special contract as ended or rescinded, and although the language of the second count is not entirely clear, no question of a breach independently of a repudiation by the defendant is before us. It is therefore an action for labor performed for the defendant based upon a disaffirmance of the contract. But the plaintiff could not take successive and mutually repugnant positions by affirming the contract in one action, and, upon his failure, then disaffirm or repudiate it, and pursue the defendant in a second action for the value of his



labor. His choice seems to have been deliberate, and uninfluenced by either accident or mistake. By suing on the contract he elected to affirm it, and the defendant's first, second, fourth and fifth requests should have been given. Peters v. Ballistier, 8 Pick. 495. Butler v. Hildreth, 5 Met. 49. LeBreton v. Peirce, 2 Allen, 8. Goodrich v. Yale, 97 Mass. 15. Lilley v. Adams, 108 Mass. 50, 52. Frisch v. Wells, 200 Mass. 429. Shoninger v. Peabody, 57 Conn. 42. Weil v. Guerin, 42 Ohio St. 299, 804. Cole v. Hines, 81 Md. 476. Daniels v. Tearney, 102 U. S. 415. Davis v. Wakelee, 156 U. S. 680, 691.

The second item of the third count, of which the third item was waived at the trial, is for services apparently independent of the plaintiff's performance of the contract. It was understood when the price was fixed, that the defendant should furnish the photographs from which the drawings were to be produced, but, after conference, the defendant having decided that new photographs should be prepared, they were taken by the plaintiff under weather conditions described by him as involving much personal inconvenience and discomfort. If the jury found that this work was done at the defendant's request. they would be warranted in giving reasonable compensation, but there being no evidence that the plaintiff was ever employed, or his advice sought as an expert, except so far as involved in the proposed execution of the drawings, there can be no recovery under the first item of the third count. The defendant's third, eighth and tenth requests were properly denied. But for reasons stated the exceptions must be sustained, and it is unnecessary to consider the remaining exceptions relating to the effect of the former judgment or to the ruling restricting the scope of the argument to the jury of the defendant's counsel, or to the instructions, as the questions will not arise at the new trial, which under the present pleadings is to be confined to the second item of the third count. Whether upon proper pleadings the plaintiff can recover damages for a breach of the contract, we do not decide.

So ordered.

MARIAN L. O'DONOUGHUE vs. ARTHUR W. MOORS.

Norfolk. January 11, 1911. — April 4, 1911.

Present: Knowlton, C. J., Loring, Brally, Sheldon, & Rugg, JJ.

Nuisance, By reason of snow or ice. Ice and Snow. Landlord and Tenant.

Where, in an action for personal injuries by reason of the alleged defective condition of the defendant's premises caused by snow and ice, there was no averment or proof that the plaintiff had given notice to the defendant of the time, place and cause of the injury within ten days as required by St. 1908, c. 305, but this conclusive defense appeared not to have been brought to the attention of the judge presiding at the trial, who had refused to order a verdict for the defendant, the case here was considered on other grounds, on which the defendant's exceptions were sustained.

A landlord is not liable to a tenant of an apartment in his building, and consequently is not liable to a guest of such tenant, for injuries from a fall caused by snow and ice on a granolithic walk in the court yard of the building leading to a public street, where it is not shown that the landlord had taken upon himself the duty of keeping the way clear of snow and ice, and it appears that the condition of the walk was due entirely to a combination of rain, snow and freezing weather, and was not due to any defect in the walk or in the building, or to the snow being trampled upon.

TORT for personal injuries sustained by the plaintiff on December 20, 1908, in the manner described below. Writ dated March 20, 1909.

In the Superior Court the case was tried before Sherman, J. The following facts were shown by the evidence.

The plaintiff lived with her sister, who was a tenant in the apartment house known as Lenox Hall, No. 1 Richmond Court, in the town of Brookline, which was the property of the defendant. The plaintiff's sister occupied an apartment under a lease from the defendant dated September 1, 1907, which was in force at the time of the accident and was introduced in evidence.

The defendant's building was constructed in the shape of a horseshoe with a central court and a granolithic sidewalk leading from Beacon Street around the courtyard next to the wall of the building and ending at another entrance from Beacon Street. The apartment in which the plaintiff lived was entered through the first of a series of doors on the left hand side of the horseshoe-shaped court, this door being about twenty-five feet from the Beacon Street entrances.

The plaintiff testified that at the time she went to live in Richmond Court, on September 1, 1907, the granolithic walk was smooth and even and was free from ice and snow or other obstructions; that about November 11, 1908, the first snow of the winter fell; that on December 18, 1908, there was a snow storm, then a fall of rain, then snow and then freezing; that on December 19, 1908, as she was taking a carriage at the door of her sister's apartment, she noticed especially that the walk from the door to Beacon Street was covered with ice which was largely in a rough condition, with some smooth ice, but largely roughened; that she again observed it between two and three o'clock in the afternoon on December 19, and that it was then in the same condition as upon the morning of that day; that from December 18 down to the time of the accident she had seen nothing done to the sidewalk; that on December 20, at the time of the accident, the sidewalk was substantially in the same condition as when she saw it on December 19; that about two o'clock P. M. on the day of the accident, she started to go to the letter box on Beacon Street, "going very cautiously, walking cautiously, trying to find a place where I could put my feet with safety"; that when "about midway between the front door of Lenox Hall and the iron gateway, one of my feet gave way from this sort of hubbly condition of ice, which was roughened as a result of the slush, freezing and slight covering of snow in parts of the walk, one foot slipped a little, the other followed at once, and I came down full force on the end of my spine."

The plaintiff further testified that the walk was in a slippery condition, though not slippery so much as hubbly, that it looked dangerous, that she did not wear rubbers except in slush or rain but that she had rubber heels on her shoes at the time of the accident, that the "driveway was covered with snow, that the snow, on account of the freezing weather, had a light crust such as one could break through and wouldn't bear you," and that one could not have walked on the snow and ice in the driveway without going through.

The plaintiff further testified that "all the walk was in the condition above described on December 18, and that it was in the same condition on December 20 at the time she received her injuries."



There was no evidence of any custom or practice with regard to the cleaning or sanding of the walks; and the only evidence with regard to what was done after the storm on December 18 was the plaintiff's testimony that she saw nothing done to the sidewalk between that date and the date of the accident.

It was admitted by the counsel for the defendant that the defendant retained the care and control of the common sidewalks and driveway in Richmond Court and in the horseshoe-shaped courtyard of Richmond Court.

There was no evidence of any defect in the sidewalk except the accumulation of ice and snow upon it, in the condition described by the plaintiff, and there was no evidence that the snow and ice upon the sidewalk had accumulated through any defect in the sidewalk or the building.

The defendant offered no testimony, but at the conclusion of the evidence asked the judge to order a verdict for the defendant. The judge refused to do so, but required the plaintiff to stipulate that if the judge erred in submitting the case to the jury, judgment was to be entered for the defendant. The jury returned a verdict for the plaintiff in the sum of \$1,500; and the defendant alleged exceptions.

The case was submitted on briefs.

H. C. Sawyer, for the defendant.

F. Hurtubis, Jr., & G. H. Power, for the plaintiff.

SHELDON, J. There was neither averment nor proof that the plaintiff had given notice to the defendant of the time, place and cause of her injury. St. 1908, c. 305. This is fatal to the maintenance of her action. Baird v. Baptist Society, ante, 29. But as we doubt whether this point was brought to the attention of the judge at the trial, or was intended to be covered by the defendant's request that a verdict be ordered in his favor, we prefer not to decide the case upon that ground.

There was no evidence of the breach of any duty owed by the defendant to the plaintiff. The defect upon the walk on which she fell was due entirely to natural causes, the combination of rain and snow with freezing weather. He had made no agreement and there was nothing to show any duty on his part to guard against or to remedy such a condition. Nothing had been done to the sidewalk since the storm that was testified to. The

snow and ice had not been alternately trampled upon and frozen as in *Urquhart* v. *Smith & Anthony Co.* 192 Mass. 257, and any rough or hubbly condition that existed must be taken to have been due solely to the weather. There was no evidence of any custom or practice as to cleaning or sanding the walk, as there was in *Nash* v. *Webber*, 204 Mass. 419. The accumulation of ice and snow was not due to any defect in the walk itself or in the building.

There is nothing here to take the case out of the general rule that a landlord is not liable to his tenant (and the plaintiff has no greater rights than the tenant whose guest she was) for injuries caused by ice and snow in the manner here disclosed, unless it is shown, as it was not shown here, that he has taken upon himself the duty of keeping the way clear of ice and snow. Woods v. Naumkeag Steam Cotton Co. 184 Mass. 357. Watkins v. Goodall, 138 Mass. 538, 536. Nash v. Webber, 204 Mass. 419. Hawkes v. Broadwalk Shoe Co. 207 Mass. 117, 122.

The defendant's exceptions must be sustained; and following the plaintiff's stipulation, judgment must be entered for the defendant.

So ordered.

John Niland vs. Boston Elevated Railway Company & another.

Suffolk. January 17, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Negligence, Street railway. Practice, Civil, Ordering verdict. Evidence, Presumptions and burden of proof.

If, at the trial of an action against a street railway company for personal injuries alleged to have been received while the plaintiff was a passenger on a car of the defendant and to have been caused by the car running into an ice wagon of a third person, there is evidence that the track was straight for a considerable distance before the car reached the wagon, that the wagon "was not going" and that the car struck some part of it, the case is one for the jury.

If at a trial there is some evidence, which, if believed, would warrant a verdict for the plaintiff, the case should be submitted to the jury although the weight of the evidence is so strongly against the plaintiff as not to justify a verdict in his favor, and, if the jury, notwithstanding the nature of the evidence, return a verdict for the plaintiff, the injustice of the finding may be corrected by the presiding judge setting aside the verdict. TORT for personal injuries alleged to have been received by the plaintiff while he was a passenger on a box electric street car of the defendant Boston Elevated Railway Company and to have been caused by the car and an ice wagon of the other defendant, the Boston Ice Company, coming into collision. Writ in the Municipal Court of the Roxbury District of the City of Boston dated June 14, 1907.

On appeal to the Superior Court, the case was prosecuted against the Boston Elevated Railway Company only, and was tried before *Pierce*, J. All facts necessary for an understanding of the decision are stated in the opinion. At the close of the plaintiff's evidence the defendant rested and the presiding judge ordered a verdict in its favor. The plaintiff alleged exceptions.

- J. L. Keogh, for the plaintiff.
- C. S. French, for the defendant railway company.

RUGG, J. There was evidence tending to show that the plaintiff, while a passenger upon one of the defendant's surface cars, was injured by its sudden stopping incident to a collision with an ice wagon, left unattended in the street. There was ample evidence to support a finding that the accident occurred through the sudden movement of the horses attached to the ice wagon which brought one of them without warning upon the track in front of the car, and that the motorman then quickly stopped his car, which was not going at an excessive rate of speed. If these were the facts, the defendant would not be liable. Timms v. Old Colony Street Railway, 183 Mass. 193.

But the plaintiff testified that the track was straight for a considerable distance, that "the ice wagon was not going" and that the car struck "some part of the ice wagon." So far as the printed record goes, this seems to warrant a finding that the plaintiff was injured by the car running into a wagon stationary upon the track. It requires no discussion to show that this might be found to constitute a violation of that high degree of care which the defendant owed to the plaintiff as its passenger.

The case, therefore, should have been submitted to the jury. If in the opinion of the Superior Court the weight of the evidence was so strongly against the plaintiff as not to warrant a verdict in his favor, and the jury should make the mistake of returning such a verdict, the injustice could be corrected by setting it aside

on motion. The practice in this Commonwealth and generally requires a submission to the jury if there is evidence proper for their consideration, even though the preponderance may appear so great to the trial judge as to require him (if requested) to set aside one or several verdicts rendered against such preponderance. White v. Boston, 122 Mass. 491. Bryant v. Commonwealth Ins. Co. 18 Pick. 543. Clark v. Jenkins, 162 Mass. 897, and cases cited. Aiken v. Holyoke Street Railway, 180 Mass. 8, 12. Lurton, J., in Mt. Adams & Eden Park Inclined Railway v. Lowery, 74 Fed. Rep. 468, 476. Taft, J., in Felton v. Spiro, 78 Fed. Rep. 576, 582.

Exceptions sustained.

Addie L. Meins, executrix & trustee, vs. Annie H. Pease & others.

Suffolk. January 18, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ.

Devise and Legacy, Executory limitation.

A devise of certain real estate and a bequest of personal property to the husband of the testator's daughter "provided, however, and this devise and bequest to him is on condition that he survives my daughter . . .; if he shall not survive my said daughter, then said " real estate and personal property "shall be the property of my said daughter," do not admit of being construed as a devise and a bequest to the husband or, if he dies during the life of the testator and the daughter survives him, to the daughter.

A will gave the bulk of the testator's property to his daughter, a part of it in trust to pay the income to herself for life, after her death to her children and the children of a deceased son of the testator, and ultimately to certain relatives of the testator. No property was given to the daughter's husband in the will. By a codicil the testator revoked a devise of a certain parcel of real estate which the will had given to the daughter, and gave it to the daughter's husband, and also gave him \$15,000, "provided, however, and this devise and bequest to him is on condition that he survives my daughter . . . ; if he shall not survive my said daughter, then said" real estate and personal property "shall be the property of my said daughter." The codicil also contained a provision cancelling all indebtedness which the daughter's husband was under to the testator at the time of the testator's death, and provided that, if any of the relatives mentioned in the trust provision in the will should die before the testator, the gift to such should be void and the daughter's husband should take except in case of the death of one designated relative, and in such case the testator's heirs at law should take. Held, that the codicil gave the \$15,000 and the designated real estate as an absolute bequest and devise to the daughter's husband subject to a conditional limitation over in case he should not survive the daughter, and that in that case the money and real estate should go to the daughter by way of executory bequest and devise.

Where by a will personal property is given to one absolutely, subject to a conditional limitation over to a second person in case the legatee should die before such second person, the first taker is entitled to receive the bequest without giving security, unless there is danger that it will not be forthcoming if the contingency occurs, and unless security is asked for on that ground.

BILL IN EQUITY filed in the Supreme Judicial Court on May 27, 1909, by one who was the executrix of, and trustee and a legatee under the will of Samuel B. Hopkins, late of Boston, the plaintiff's father, for instructions. The defendants are children of a deceased son of the testator and Charles E. Meins, the plaintiff's husband.

The will, after providing for the purchase and perpetual care of a burial lot for the interment of the testator, of the plaintiff and her husband and any children that they might have, and of the widow of a deceased son and her children, gave to the plaintiff all the household furniture and personal belongings in the house where the testator resided, numbered 565 Boylston Street in Boston, and all the horses and contents of the stable, ten shares of bank stock, and "all my other personal property not herein otherwise disposed of"; also "the estate and premises, consisting of land, dwelling house and stable on Centre Street, Brookline," and an estate and premises at Cottage City, and the contents of the buildings on such estates.

To the widow of the testator's son was given a diamond ring, which formerly was the son's, and ten shares of bank stock.

By the "sixth section" of the will there was given to the plaintiff in trust the Boylston Street property to use and occupy so long as she should see fit, with authority to let it or sell it, the income to be paid to herself during her life and after her death to be divided between her children, if any, and those of the testator's deceased son, with directions for the payment to certain other specified persons in case of failure of grandchildren of the testator.

The residue of the testator's property also was given to the plaintiff in trust with directions as to payment of the income to herself for life, after her death to her children, if any, and to those of the deceased son, and with directions, in case of failure

of such beneficiaries, for the payment to those who would have been the testator's heirs at law had he died intestate.

The codicil of the will, regarding which the bill sought instructions, was as follows:

"First: I revoke the devise of the estate and premises, consisting of land, dwelling house and stable, situated on Centre Street in Brookline, given by the Fourth Section of my said will to my daughter, Addie L. Meins, and I give and devise said estate and premises to her husband, Charles E. Meins, — To Have and to Hold the same to him and his heirs and assigns forever. I also give and bequeath to said Charles E. Meins the sum of fifteen thousand dollars (\$15,000); provided, however, and this devise and bequest to him is on condition that he survives my daughter Addie L. Meins; if he shall not survive my said daughter, then said estate and premises and said sum of fifteen thousand dollars (\$15,000) shall be the property of my said daughter.

"I also cancel all indebtedness which said Charles E. Meins may be under to me at the time of my decease.

"Second: In case Ann Taylor, Annie Pollister, Caroline Swett and Maude G. Hopkins, [persons designated in the will to receive income from the proceeds of the sale of the Boylston Street property in case of failure of grandchildren of the testator] mentioned in the Sixth Section of my said will, or any of them, shall die in the lifetime of my said daughter, Addie L. Meins, I revoke the gift and devise to them or any of them so dying, and make the same null and void; and I give and devise the share or interest given to them or any of them so dying, to said Charles E. Meins. And in case Blanche R. Ellis named in said Sixth Section of my said will shall die in the lifetime of my said daughter, I revoke the gift and devise to her and make the same null and void; and I direct that the share otherwise coming to her, shall revert to my heirs at law, had I then died unmarried, intestate and without issue."

The case was reserved by Braley, J., for determination by the full court.

The case was submitted on briefs.

A. P. Worthen, for the plaintiff.

C. H. Tyler, O. D. Young & W. C. Rice, for the defendants Annie H. Pease and Ethel H. Emmes. LORING, J. The first question is whether the husband, having survived the testator, took an indefeasible fee in the Brookline house together with the stable and the absolute interest in the \$15,000 as in case of a gift to A. or, if he dies, to B. In such cases it is settled that the alternative gift has reference to A.'s dying during the life of the testator. For a collection of cases on that point see Burdge v. Walling, 18 Stew. 10, and Jones v. Webb, 5 Del. Ch. 182. In our opinion this gift does not admit of being construed to be the equivalent of such an alternative devise or bequest.

The second question is whether the condition here in question is a condition precedent or a condition subsequent. If the condition imposed upon the devise and bequest to the daughter's husband is a condition precedent to the real estate and money vesting in him, neither he nor his wife takes until it is ascertained which survives the other. And in that case it is the contention of the granddaughters that the income of the bequest during the interval would pass to the daughter under the bequest to her of the residue of the personal property, and that the income of the house and stable would pass one half to the daughter and one half to them under the devise of the residue of the real On the other hand, if it had been the intention of the testator in inserting this proviso to provide that the absolute devise and bequest just made to the daughter's husband should be subject to a conditional limitation over in case he should not survive his wife (the testator's daughter), and that in that case it should go to the daughter by way of executory devise and bequest (like the gifts over in Richardson v. Noyes, 2 Mass. 56; Brightman v. Brightman, 100 Mass. 238; Goodwin v. McDonald, 153 Mass. 481; Welch v. Brimmer, 169 Mass. 204), the words which should have been used to express that intention would not have differed widely from those used by the testator. The words used by the testator may well be taken to have been an awkward way of stating that to have been his intention. And interpreted in the light of the general scheme of the will and codicil we are of opinion that they should be so construed. Taking the scheme of the will and codicil as a whole, it is evident that in making this codicil the testator intended to enrich the daughter's husband at the expense of his wife (the testator's daughter), but **VOL. 208.**

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not to benefit the grandchildren. He forgave the husband all his debts (those debts otherwise would have gone to the daughter under the gift to her of the residue of the personal property); he took away from his daughter and gave to her husband the Brookline house and stable (specifically devised to her) and \$15,000 (which otherwise would have passed to her under the bequest of the residue of the personal property). Apart from the bequest to his own heirs of the share of one of the eight nieces in case that niece predeceased him, the testator did not benefit anybody but his daughter's husband by making the codicil. So far as the Brookline estate and the \$15,000 were concerned, it seems to have been the testator's intention that the husband should have them in preference to his wife, and that subject to that preference they should go to the wife and no one else.

The house and stable are now vested in the husband and he is entitled to receive the \$15,000 from the executor. It is settled, that in a case like the present the first taker is entitled to receive the money without giving security unless there is danger that it will not be forthcoming if the contingency occurs, and unless security is asked for on that ground. Homer v. Shelton, 2 Met. 194. Fiske v. Cobb, 6 Gray, 144. Bradlee v. Appleton, 16 Gray, 575. Schmaunz v. Goss, 182 Mass. 141. Hooper v. Bradbury, 138 Mass. 303. Thissell v. Schillinger, 186 Mass. 180.

Decree accordingly.

COMMERCIAL WHARF CORPORATION vs. CITY OF BOSTON. SAME vs. SAME.

Suffolk. January 26, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Landlord and Tenant. Boston. Municipal Corporations, Officers and agents. Notice. Landing Place. Contract, Implied in fact.

A vote of the city council of Boston in 1891, authorizing the board of health to lease from the owner of a certain wharf "a location for a boat landing," and a further vote of the council in 1896, authorizing the board of health to extend a lease made in accordance with the previous vote, the rental "to be charged to the appropriation for city council incidental expenses," were inoperative and void,

being contrary to the provisions of St. 1885, c. 266, § 12, in force at the time, that the council should not "directly or indirectly take part in the employment of labor, the making of contracts, the purchase of materials or supplies, the construction, alteration or repair of any public works, buildings or other property, or the care, custody and management of the same, or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except such as may be necessary for the contingent and incidental expenses of the city council or of either branch thereof."

The mayor of Boston in 1891 had no power, either under St. 1885, c. 266, § 6, or under St. 1890, c. 418, § 6, to execute on behalf of the city a covenant to pay rent contained in a lease to the city from the owner of a wharf of a landing place thereon, which the city council, contrary to the provisions of St. 1885, c. 266, § 12, had voted to authorize the board of health to lease, and such a covenant, contained in a lease made in accordance with such a vote and executed and delivered on behalf of the city by the mayor, is inoperative and void, as also is an extension thereof to a period in 1901; and such invalid acts are not made valid by payments by the city of rent under the covenant in accordance with votes of the city council attempting to authorize such payments from an appropriation made for incidental expenses of the council, such payments being unlawful, nor by acts of subsequent mayors which, if such mayors had had power to execute the lease on behalf of the city, would have amounted to ratification of the lease and its extension.

Where one is invited or seeks to make a certain contract with a municipal corporation, he is chargeable with knowledge of the extent of or lack of authority of the corporation and its various officers and agents to make such a contract.

A new landing place cannot be established or laid out by a city without legislative authority.

Since the city of Boston has no authority to make an express agreement to pay rent for the use and occupation of a landing place upon a wharf of a private person, which it does not use for purposes of pecuniary gain, benefit or advantage or in performance of some public duty enjoined upon it by statute, it is not liable, after an occupation by it of such a landing place with the owner's permission for nine months, in an action upon an account annexed for use and occupation, since as matter of law the city cannot be made liable upon an implied contract to pay for what it had no power to make an express contract to pay for.

Two actions of contract, each with a declaration, as amended, containing two counts, the first count being upon a covenant to pay rent for certain premises in Boston for a certain period of time, and the second count being for use and occupation of the same premises for the same period of time. The declarations each stated that both of the counts were for the same cause of action. The period covered by the first action was from March 1, 1903, to June 1, 1903, and that covered by the second action was from June 1, 1903, to December 1, 1903. Writs in the Municipal Court of the City of Boston dated respectively August 17 and December 14, 1903.

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On appeal to the Superior Court the cases first were tried together before *Hardy*, J., upon declarations containing only the first counts. Exceptions by the plaintiff to a ruling of the presiding judge ordering verdicts for the defendant were sustained by this court in a decision reported in 194 Mass. 460, where the facts, most of which are not material to an understanding of the present decision, are stated fully.

There was a second trial of the cases before *Pierce*, J., after the declarations had been amended by adding the second counts. The original lease to the defendant was executed on November 80, 1891, and was for a term of five years. A renewal was executed in 1906 for five years more. Quarterly payments of the amount specified in the lease as rent were made to the plaintiff by the defendant to April 18, 1908. Other material facts are stated in the opinion.

St. 1885, c. 266, § 6, as amended by St. 1889, c. 320, is as follows: "The executive powers of said city [of Boston], and all the executive powers now vested in the board of aldermen, as such, as surveyors of highways, county commissioners or otherwise, shall be and hereby are vested in the mayor, to be exercised through the several officers and boards of the city in their respective departments, under his general supervision and control. Such officers and boards shall, in their respective departments, make all necessary contracts for the employment of labor, the supply of materials, and the construction, alteration and repair of all public works and buildings, and have the entire care, custody and management of all public works, institutions, buildings and other property, and the direction and control of all the executive and administrative business of said city. They shall be at all times accountable for the proper discharge of their duties to the mayor, as the chief executive officer, whose duty it shall be to secure the honest, efficient and economical conduct of the entire executive and administrative business of the city, and the harmonious and concerted action of the different departments. Every contract made as aforesaid in which the amount involved exceeds two thousand dollars shall require the approval of the mayor before going into effect; and no expenditure shall be made nor liability incurred for any purpose beyond the appropriation duly made therefor, except that at the beginning of the financial year,

to meet the liabilities of the several departments incurred in the carrying on of the work entrusted to them, until the city government shall otherwise order, expenditures may be made, liabilities may be incurred and payments made from the treasury from any funds therein, and the treasurer may borrow money in anticipation of taxes to provide funds. Such expenditures and liabilities shall not exceed for each department, one-third the entire amount appropriated for the department the previous year, and shall be considered and reckoned as a part of the expenditures of, and the money paid therefor as a part of the appropriations for, the current financial year."

Section 12 of the same chapter is as follows: "Neither the city council nor either branch thereof, nor any member or committee thereof or of either branch thereof, nor the board of aldermen acting in any capacity in which said board may act separately under special powers conferred upon it, nor any member or committee of said board acting in any such capacity, shall directly or indirectly take part in the employment of labor, the making of contracts, the purchase of materials or supplies, the construction, alteration or repair of any public works, buildings or other property, or the care, custody and management of the same, or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except such as may be necessary for the contingent and incidental expenses of the city council or of either branch thereof, nor, except as is otherwise provided in sections one and two, in the appointment or removal of any officers or subordinates for whose appointment and removal provision is hereinbefore made; but nothing in this section contained shall affect the powers or duties of the board of aldermen in relation to state aid to disabled soldiers and sailors, and to the families of those killed in the civil war."

St. 1890, c. 418, § 6, is as follows: "All contracts made by any department of the city of Boston shall, when the amount involved is two thousand dollars or more, be in writing, and no such contract shall be deemed to have been made or executed until the approval of the mayor in writing is affixed thereto. All such contracts shall be accompanied by a suitable bond or deposit of money or other security for the faithful performance

of such contracts, and such bonds or other security shall be deposited with the city auditor until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his or their bond, and the officer or board making the contract, with the approval of the mayor affixed thereto."

At the close of the evidence, the defendant asked the presiding judge to give the following rulings, among others:

- "1. Upon all the evidence the plaintiff is not entitled to recover in either action."
- "8. The defendant was not required to give notice of any kind to the plaintiff in order to terminate the tenancy."
- "7. There is no evidence in these cases which would warrant the jury in finding that the defendant became at any time after the expiration of the lease a tenant at will of the leased premises and consequently no notice was necessary from the defendant to the plaintiff to terminate the tenancy."

The judge refused to rule as requested, and submitted to the jury three questions, which they answered as follows:

- 1. Q. "Did the defendant make use of or occupy the premises of the plaintiff as a public landing place between March 1, 1903, and June 1, 1903?" A. "Yes."
- 2. Q. "Did the defendant make use of or occupy the premises of the plaintiff as a public landing place between June 1, 1903, and December 1, 1903?" A. "Yes."
- 8. Q. "Did the plaintiff and defendant, at any time between December 1, 1901, and December 1, 1908, agree by reason of the facts and circumstances in the testimony the one to hold and the other to permit to be held the possession, use or enjoyment of the premises as a public landing place?" A. "Yes."

The jury found for the plaintiff in both actions; and the defendant alleged exceptions.

- J. D. McLaughlin, for the defendant.
- B. E. Eames, (C. W. Hood with him,) for the plaintiff.

BRALEY, J. It was said upon exceptions taken by the plaintiff at the first trial of these cases, after a verdict had been ordered for the defendant, that "no question seems to have been made but the lease and the extension for five years from December 1, 1896, were duly executed and became binding

upon the defendant. Nor was there any dispute that for any occupation of the whole or a part of the leased premises after the term of the lease, as extended, had expired, the defendant would be liable to pay rent at the rate stipulated in the lease. The question at issue was whether there had been such occupation," and it was decided that "the liability of the defendant depended upon whether it actually had occupied any part of the leased premises during the period sued for; and this presents a question of fact to be determined by the jury." Commercial Wharf Co. v. Boston, 194 Mass. 460, 466, 468. The cases are now before us on the defendant's exceptions after verdicts for the plaintiff at the second trial, upon the original declaration counting on the covenant in the lease, that the defendant should pay rent at the same rate for such further time as it should hold the premises after the lease expired, and upon the amended declaration with a count for use and occupation during the periods in dispute.

It being alleged that both counts are for the same cause of action, they are inconsistent. If the defendant held over without any further agreement, it was a tenant at sufferance, and would be liable for the rent at the rate reserved in the lease, until the premises were vacated. R. L. c. 129, § 3. Edwards v. Hale, 9 Allen, 462. Warren v. Lyons, 152 Mass. 810. Benton v. Williams, 202 Mass. 189. The distinction between an action on a covenant of this nature, and on an implied contract creating a tenancy at will where the occupation continues beyond the term is stated in Leavitt v. Maykel, 203 Mass. 506, 510. See Mullaly v. Austin, 97 Mass. 80, 83. But no request was made, that the plaintiff be required to elect, and if the evidence supports either count, the general verdict will stand, and judgment may be entered on that count. Brown v. Woodbury, 183 Mass. 279. West v. Platt, 127 Mass. 867, 871.

The defendant's request for rulings, that upon all the evidence the plaintiff was not entitled to recover, and that the jury would not be warranted in finding that it was a tenant at will, having been denied, the city contends, that as a municipal corporation whose powers were defined by statute, it was not bound by either the lease, or the agreement of extension, and that the evidence was insufficient to justify the finding of its occupancy of the premises, or, if sufficient, it is not responsible under an

implied agreement to pay for use and occupation. The former opinion did not discuss or determine these questions. We take them up for decision in the order stated.

The votes of the city council "authorized" the board of health to lease the premises as "a location for a boat landing," and when the original lease was about to expire to renew the lease for a further term, the rental "to be charged to the appropriation for city council incidental expenses." But the lease and agreement of extension were not signed by the board, and on the face of the instrument, the city never became obligated unless bound by the mayor's execution of the contracts in its behalf. The mayor acted under the votes. If the first vote was invalid, the second falls with it. The St. of 1885, c. 266, § 12, relating to the chartered powers of the defendant, and in force when the votes were passed, contains this provision: The city council shall not "... directly or indirectly take part in the employment of labor, the making of contracts, the purchase of materials or supplies, the construction, alteration or repair of any public works, buildings or other property, or the care, custody and management of the same, or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except such as may be necessary for the contingent and incidental expenses of the city council or of either branch thereof. . . ." The board of health alone under § 6 had authority to make the necessary contracts, required in the proper management of the health department. If under St. of 1890, c. 418, § 6, where the expenditure involved equals a certain amount, the mayor's approval in writing must be obtained or the contract is not valid, the mayor's power to act is limited to contracts which originate with the departments, the proper discharge of whose administrative functions renders the contract advisable or necessary. By St. 1885, c. 266, § 12, the city council was not a department within the purview of the statute, and could not make contracts. The original execution of the lease, and the indorsement on the lease of the extension of the term, by the respective mayors who held office at the time, were inoperative and void. The appropriation, moreover, was provided for its own incidental expenses as a distinct municipal body. It could not annually be increased for a purpose wholly

foreign, by adding the amount of the yearly rent to accrue under the lease, or lawfully be transferred and diverted to the board of health to be spent not for the preservation of the health of the community, but as the evidence shows, for the accommodation of the general public. *Hennessey* v. *New Bedford*, 158 Mass. 260.

Nor were the payments of rent until the prolonged term expired and at a similar rate for some six months thereafter, or the notices of the mayor that the lease had terminated and that the premises would be vacated and surrendered, proof of ratification. The money paid was illegally disbursed, and the mayor, having no original authority to make the contracts, could not subsequently give them life by his official recognition. St. 1885, c. 266, §§ 6, 12. Nelson v. Georgetown, 190 Mass. 225, 229. Revere Water Co. v. Winthrop, 192 Mass. 455, 462.

It is put beyond question under our decisions, that parties who are invited, or seek to enter into contractual relations with a municipal corporation cannot if the contract is made, plead want of knowledge of such statutory limitations in avoidance, and the plaintiff, having been charged with notice of the invalidity of the lease, cannot recover on the covenant. Adams v. Essex, 205 Mass. 189, 197.

We assume the evidence warranted the special findings of the jury so far as they were applicable to the second count, that with the plaintiff's permission the defendant, after the expiration of the prolonged term, occupied the premises during the months sued for, and the instructions as to the essential elements of a tenancy at will, which the plaintiff must prove in order to recover, were unexceptionable. Rice v. Loomis, 139 Commercial Wharf Co. v. Boston, 194 Mass. 460. Mass. 802. A tenancy at will, however, rests upon an express or implied contract. Knowles v. Hull, 99 Mass. 562, 565. And our attention has not been called to any general law, or special provision of the defendant's charter, authorizing the city to expend any portion of the revenue raised by taxation, to procure or to maintain a location for a boat landing. "Landing places," said Chief Justice Parker, in Kean v. Stetson, 5 Pick. 492, 495, "have in some towns existed by immemorial usage on the banks, and perhaps on the shores of creeks or rivers, but towns have

no right to create them either as such, or under the pretense of laying out a way," and new landing places cannot be established or laid out without legislative authority. Commonwealth v. Tucker, 2 Pick. 44. Winslow v. Gifford, 6 Cush. 327. Bennett v. Clemence, 6 Allen, 10. Commonwealth v. Roxbury, 9 Gray, 451, 527. If the city's occupation had conferred upon it some pecuniary gain, benefit or advantage, or was in performance of some public duty enjoined by statute, it could be held under the implied contract upon which the plaintiff must rely. Spaulding v. Peabody, 153 Mass. 129. Dickinson v. Boston, 188 Mass. 595, 599. Douglas v. Lowell, 194 Mass. 268. Capron v. Taunton. 196 Mass. 41, 44. But there is no evidence that the premises were required for any general or special municipal use or were provided for or occupied by any of the various departments of the city, and it was not within the power of the defendant to expend its income for a purpose not authorized by statute. Cavanagh v. Boston, 189 Mass. 426. Bartlett v. Lowell. 201 Mass. 151.

The first request should have been given and the exceptions must be sustained, but as the plaintiff manifestly has no cause of action, judgment is to be entered for the defendant under St. 1909, c. 286.

So ordered.

HENRY W. BARNES, administrator with the will annexed, vs. FREDERICK A. CHASE.

Essex. January 27, 1911. — April 4, 1911.

Present: Knowlton, C.J., Morton, Loring, Bralley, & Rugg, JJ.

Will, Execution.

An alleged testator, who in his own handwriting had written his name in the exordium clause of a printed form for a will and had filled in the rest of the blank form except in the testimonium and attestation clauses, asked three persons to see him sign his will and thereupon wrote in the date in the testimonium clause, but did not sign the document, and in his presence and in the presence of each other the witnesses subscribed their names below the attestation clause, and he left the house. Five minutes later he returned, stating, "I forgot to sign my name to my will." Thereupon, in the presence of the same three witnesses he wrote his name in a blank space in the attestation clause but nowhere else. The

witnesses did not sign again. Held, that the statement of the alleged testator to the witnesses showed that he had not written his name in the exordium clause intending it to stand as his signature to the will, that the writing of his name in the testimonium clause, assuming it to have been good as a signature, was not attested by three witnesses who subscribed the will after its execution by the testator as required by our statute, and therefore that the will never was properly executed by the alleged testator.

APPEAL from a decree of the Probate Court for the county of Essex allowing the will of Elizabeth G. Bradley, late of Haverhill.

The appeal was heard by Rugg, J., upon an agreed statement of facts, from which it appeared that the will was written upon a form, part of which was printed; that all the written parts were in the handwriting of the alleged testatrix, she having written her name in the exordium clause; that the testimonium clause of the will read as follows, the words in italics being in the handwriting of the alleged testatrix:

"In testimony whereof I hereunto set my hand and in the presence of three witnesses declare this to be my last will this twelfth day of January in the year one thousand nine hundred 10.

"On this twelfth day of January A. D. 1910 Elizabeth G. Bradley of Haverhill Massachusetts, signed the foregoing instrument in our presence, declaring it to be her last will: and as witnesses thereof we three do now, at her request, in her presence, and in the presence of each other, hereto subscribe our names.

"Oscar L Colomy Ella L Colomy. Eva W Colomy."

At about seven o'clock on the evening of January 12, 1910, the alleged testatrix had come to the home of those who signed the above paper as witnesses, having made an appointment for them to witness her will. She immediately sat down at the kitchen table, unfolded the paper and asked Eva Colomy to bring her some ink and a pen. These being brought, she asked the three, Oscar L., Eva W. and Ella L. Colomy, to stand where they could see her sign her will. The three gathered around her and she took the pen and proceeded to read to them the testimonium clause, at the same time writing the day of the month, the month and the year therein. She then arose and said "now it is ready

for you to sign"; all three thereupon signed the attestation clause in her presence and in the presence of each other. She then thanked them, folded up the paper and went back to her home. In about five minutes she came back into the kitchen of the Colomy house and said, "I forgot to sign my name to my will." She then sat down at the same table and again asked the witnesses to gather around and see her sign her name. This all three did and she wrote her name where it appears in the attestation clause of said will and returned to her home.

The single justice ordered that the decree of the Probate Court be reversed and, at the request of the parties, reported the case to the full court for determination, a decree to be entered reversing the decree of the Probate Court and disallowing the instrument offered for probate and fixing the amount to be allowed to the petitioner for his costs and expenses and remanding the cause to the Probate Court for further proceedings, if the rulings of the single justice were right; otherwise, such decree to be entered as the law might require.

The case was submitted on briefs.

- E. B. Fuller & R. E. Gardner, for the petitioner.
- A. C. Spalding & G. H. Spalding, for the respondent.

LORING, J. The difference between the case made out in this suit and that made out in *Meads* v. *Earle*, 205 Mass. 558, is to be found in the statement made by Elizabeth on her return to the Colomy kitchen five minutes after the attesting witnesses had subscribed their names to the instrument now propounded as her last will, namely: "I forgot to sign my name to my will." That remark showed that she did not write her name in the exordium clause intending it to stand as her signature to the will when complete.

It is apparent that when the attesting witnesses subscribed their names the instrument had not been signed and that if it be assumed that in subsequently filling in her name in the testimonium clause Elizabeth did sign the instrument the attesting witnesses did not afterwards subscribe their names. It follows that the paper never was properly executed as the will of Elizabeth Bradley. See *Chase* v. *Kittredge*, 11 Allen, 49; *Marshall* v. *Mason*, 176 Mass. 216.

By the terms of the report a "decree is to be entered revers-

ing the decree of the Probate Court and disallowing the instrument offered for probate as the last will and testament of Elizabeth G. Bradley, and fixing the amount to be allowed to the petitioner for his costs and expenses and remanding the cause to the Probate Court for further proceedings."

So ordered.

COMMONWEALTH vs. WILLIAM W. DREW.

Suffolk. February 28, 1911. — April 4, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Board of Health, Municipal. Milk.

The board of health of a city, undertaking to act under the authority given to them by R. L. c. 75, §§ 65, 140, made the following regulation: "No person or corporation shall sell or offer, expose or keep for sale in any shop, store or other place where goods and merchandise are sold, milk or cream, unless the same is sold or offered, exposed or kept for sale in tightly closed or capped bottles or receptacles, which have been approved by the board of health." Held, that the statute, which confines the jurisdiction of the board to examining into all nulsances, sources of filth and causes of sickness in the city that in their opinion may be injurious to the public health, to destroying, removing or preventing "the same as the case may require," and to making "regulations for the public health and safety relative thereto and to articles . . . capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed through "the city, does not give the board power to make a regulation as to the sale of milk kept and sold in any such way as does not threaten the public health.

A dealer in milk in a city kept in his store for sale wholesome milk of standard quality in a new tin cylinder or vessel with a new, clean removable top, the vessel being contained in a covered cooler, which was kept in a location and under such conditions as were approved by the board of health, contained wholesome, clean ice, and was properly drained and cared for and tightly closed except when milk or ice was being removed from or introduced into it. The milk always remained at a temperature less than fifty degrees Fahrenheit and none of it was allowed to stand outside of the cooler except when a sale was being made. The measure which was used in retailing the milk was new and clean and hung inside the cylinder which contained the milk. The cylinder was simple in shape, was easily cleaned and was susceptible of perfect sterilization. Held, that R. L. c. 75, §§ 65, 140, gave to the board of health of the city no jurisdiction or power to take any action or to make any regulation with regard to milk so kept and

COMPLAINT received and sworn to in the Municipal Court of the City of Boston on November 29, 1910, charging the defendant with a violation of a regulation of the board of health relative to the sale of milk, as stated in the opinion.

On appeal to the Superior Court, the case was tried before Stevens, J., upon an agreed statement of facts. The defendant asked for rulings that upon the facts in proof there was no evidence upon which the defendant could be found guilty, and that a verdict of not guilty should be ordered; that the regulation upon which the complaint was founded was invalid and void, in that it was unreasonable and not within the lawful exercise of any police power of the board of health of the city of Boston, and in that it was in violation of the limitations and restrictions of the constitution of the Commonwealth and of the United States, and that no conviction could be had for the violation of the regulation with which the defendant was charged.

The rulings were refused. The defendant was found guilty, and the presiding judge reported the case for determination by this court, with the following stipulation: "If any one of the rulings requested by the defendant should have been given, the verdict is to be set aside and a verdict of not guilty is to be directed by the court. If there is no error in my rulings, the verdict is to stand as rendered."

The case was submitted on briefs.

M. J. Sughrue, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

Knowlton, C. J. This is a complaint against the defendant for the violation of a regulation of the board of health of the city of Boston, relative to the sale of milk. The material part of the regulation is as follows: "No person or corporation shall sell or offer, expose or keep for sale in any shop, store or other place where goods and merchandise are sold, milk or cream, unless the same is sold or offered, exposed or kept for sale in tightly closed or capped bottles or receptacles, which have been approved by the board of health." It was agreed that milk was kept for sale by the defendant in a vessel contained in a covered cooler, in his store; that it was always kept at a temperature less than fifty degrees Fahrenheit, and that none of it was allowed to stand outside of the cooler except while a sale of milk was being made; that the cooler was always kept properly drained and cared for and

tightly closed, except during such interval as was necessary for the introduction or removal of milk or ice, and was kept in such location and under such conditions as were approved by the board of health. The milk was wholesome milk of standard quality. was taken from a clean, new tin cylinder or vessel, set in a clean, new ice chest, surrounded by clean, wholesome ice. The vessel had a removable cover which was new and clean, and the measure which was used by the defendant in retailing the milk was new and clean, and hung inside the tin cylinder so that it was not exposed to the air. The cylinder was simple in shape, is easily cleaned and was susceptible of perfect sterilization. The sales were made in any quantities desired by customers, from one cent's worth upward. The defendant's store was in a district in which many poor people live, and facts were agreed tending to show that such people often want to purchase a quantity less than the quantity contained in the smallest bottles used, and would be put to inconvenience by the enforcement of the regulation.

We do not consider the question whether this regulation is beyond the constitutional power of the Legislature to enact as a statute, or to authorize the board of health to establish locally. For we are of opinion that the statute under which the board assumed to act, (R. L. c. 75, § 65,) is not broad enough to give them this authority. It is as follows: "The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may in its opinion be injurious to the public health, shall destroy, remove or prevent the same as the case may require and shall make regulations for the public health and safety relative thereto and relative to articles which are capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed from its town, or into or from any vessel." By § 140 of this chapter the section is made applicable to cities.

This statute does not give the board power to make regulations as to all matters affecting the public health. If the board should be certain that the smoking of cigarettes by boys affects their health injuriously, it would have no power to make a regulation forbidding the smoking of them by boys under a certain age, or the sale of them to such boys. It has no power to make gen-

eral regulations as to conduct or practices injurious to health, which, if indulged in by many persons, affect the health of the public. The statute above quoted gives the board jurisdiction to deal with "nuisances, sources of filth and causes of sickness within its town." Plainly the milk in question was not a nuisance or a source of filth. In determining the meaning of the words "causes of sickness," the doctrine noscitur a sociis is to be applied. It is a little broader term than the two terms that precede it, but it is of the same general character. Primarily it refers to something local, and the board is directed "to destroy, remove or prevent the same." In § 67 we have another indication of the meaning of these words in the requirement that the board shall order the owner or occupant of private premises to remove any "nuisance, source of filth or cause of sickness found thereon." So under § 74 he may obtain a warrant directed to an officer or to a member of the board, commanding him to destroy, remove, or prevent any unisance, source of filth or cause of sickness," in reference to which they have made complaint to a magistrate. We are of opinion that, within the meaning of the language in these sections, milk kept in a vessel, as this was kept by the defendant, was not a "nuisance, source of filth or cause of sickness," which gave the board of health jurisdiction to take any action or make any regulation under the R. L. c. 75, § 65.

The latter portion of this section gives the board jurisdiction to make regulations "relative to articles which are capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed from its town, or into or from any vessel." This has reference to the bringing into the town or conveying away of articles capable of containing or conveying infection, in such a way as to affect injuriously the public health or safety. The legislation is found in the Rev. Sts. c. 21, § 6, in which the language is, " when such articles shall be brought into or conveyed from their town, or into or from any vessel." In the Gen. Sts. c. 26, § 5, the words, "when such articles shall be" are omitted, and the section reads in this part, "brought into or conveyed from its town, or into or from any vessel." In Pub. Sts. c. 80, § 18, the language is the same. We are of opinion that this part of the section relates to articles of such a kind as to be dangerous in reference to their capability of

containing or conveying infection or contagion, or of creating sickness, in connection with their removal from one town to another. The case of *Train* v. *Boston Disinfecting Co.* 144 Mass. 528, relative to the disinfecting of rags, furnishes an illustration of what is meant by the statute.

The regulation in the present case has no reference to property in connection with its removal from one city or town to another, nor is pure milk such an article as is referred to in the statute. We are of opinion that this part of the section does not authorize a regulation as to the sale of milk kept and sold in the manner that is disclosed in this case.

We have no occasion to consider the objection to the regulation in that part which subjects the business to an absolute determination of the board as to whether they will approve of the bottles or receptacles used in making sales. See *Commonwealth* v. *Maletsky*, 203 Mass. 241.

Verdict set aside.

Moses Williams & others, trustees, vs. City of Boston.

Suffolk. March 7, 1911. — April 4, 1911.

Present: Knowlton, C. J., Hammond, Braley, Sheldon, & Rugg, JJ.

Tax, Abatement, Assessment. Partnership. Trust.

On an appeal under St. 1909, c. 490, Part I. § 76, from a refusal of the assessors of a city to abate a tax, it appeared that the petitioners were the trustees of a real estate trust represented by shares, who seven years before the assessment of the tax had made a contract for the purchase of certain real estate from a museum corporation, and that the tax of which an abatement was sought was upon \$1,500,000, which had been advanced to the museum corporation by the petitioners in part payments under the terms of the contract. It was provided in the contract that the petitioners should not receive the title to the real estate until all of the purchase money had been paid, and that in the final adjustment of payments between the parties the museum corporation should pay interest on all sums thus received by it at the rate of four and one quarter per cent per annum. At the time of the assessment the title to the property was still in the museum corporation. It was contended by the respondent that the advance payments in the hands of the museum corporation at the time of the assessment were loans from the petitioners which were taxable to them as "money at interest." Held, that the part payments when made became the property of the museum corporation, and that the fact that interest was to be allowed on them from the time of each payment did not convert them into loans; so that 82 **VOL. 208.**

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they could not be taxed to the petitioners and the attempted tax on them should be abated.

The holders of transferable certificates representing shares in personal property, which is held and managed by trustees, without incorporation, although the trust agreement provides that neither the shareholders nor the trustees shall be liable personally for the debts of the trust, are partners within the meaning of R. L. c. 12, § 27, (St. 1909, c. 490, Part I. § 27,) and are to be taxed as such shareholders jointly under the partnership name in the place where the business of the partnership is carried on. Consequently they are not to be treated for purposes of taxation merely as cestuis que trust, whose interests would be assessed under R. L. c. 12, § 23, cl. 5, (St. 1909, c. 490, Part I. § 23, cl. 5,) in the different places where they resided, if within the Commonwealth.

Knowlton, C. J. This is a complaint in the nature of an appeal, under the provisions of St. 1909, c. 490, Part I. § 76, from the refusal of the assessors to abate a tax assessed to the petitioners.* The principal question is whether the petitioners. who are the trustees of the Copley Square Trust, were assessable for the year 1909, for an interest in the Museum of Fine Arts, or for money advanced as part payments of the purchase price of it under an agreement made on April 22, 1902. In accordance with the terms of this agreement, a deed of the property was made by the selling corporation and was delivered to a trust company as an escrow, to be delivered to the petitioners when the price was fully paid, or when, at the option of the petitioners, the deed should be demanded by them and their note, secured by a mortgage of the land, should be given as security for the balance of the purchase money, together with a lease to the vendor for a term ending at the time fixed for the payment of the last instalment of the purchase money, but in no event earlier than June 20, 1907. The purchase price was \$1,800,000, and the instalments were to be paid, \$500,000 on June 20, 1902, \$500,000 on June 20, 1904, \$500,000 on June 20, 1906, and the balance, \$800,000, on the delivery of possession, which, at the option of the vendor, might be either on June 20, 1907, or June 20, 1908, or June 20, 1909. This time was afterwards fixed by the corporation, hereinafter called the Museum, as June 20, 1909. Be-



[•] In the Superior Court the case was submitted upon an agreed statement of facts to *Hitchcock*, J., without a jury. He found that the petitioners were not entitled to an abatement and ordered that judgment should be entered for the respondent. At the request of the parties, he reported the case for determination by this court.

fore the time for the assessment of taxes for the year 1909, the petitioners had paid \$1,500,000, in accordance with this agreement. There was also an agreement that, in the final adjustment of payments between the parties, the Museum should pay interest on all sums received by it or credited by it under an agreement of even date therewith, entitled "Agreement as to Lapse of Scrip" on account of the price, and on all sums received by it for costs and expenses under another provision, which provisions were incidental to and a part of the general transaction. These incidental provisions are not now material to our inquiry. The agreement of sale and purchase was carried out substantially according to its terms. The deed was made and was delivered as an escrow, but the legal title to and the possession of the real estate remained in the vendor until June 19, 1909.

It is plain that the real estate was not taxable as such to the petitioners for the year 1909, and no attempt has been made to tax them for it. After the contract was made and the first payment was advanced the petitioners held equitable rights in the land. Felch v. Hooper, 119 Mass. 52. But such rights are not taxable in this Commonwealth, and the respondent does not contend that they are.

Its contention is that the \$1,500,000 which had been advanced in payment and upon which the Museum was to allow interest at the rate of four and one quarter per cent per annum was taxable under the statute as money at interest.* This contention presents the question whether, under the contract, the ownership of this money had passed to the Museum, so that the arrangement for the payment of four and one quarter per cent upon it was not as interest upon money then owned by the petitioners and put into the control of the Museum, to be held as a loan until the time for the delivery of the deed arrived, but rather as a compensation for the use of the property until the deed should be delivered and the possession transferred, or whether this payment was strictly as interest upon money belonging to the petitioners, and held by the Museum as their property until the time for the change of title to the real estate. We feel constrained to construe the contract as calling for payments in advance, which transferred the title to the money



[•] R. L. c. 12, § 4, cl. 2. See Sweetser v. Manning, 200 Mass. 378.

absolutely to the Museum, and made the Museum the owner, not only of the legal title to the real estate by virtue of its deed which had not been delivered, but of the sums of money advanced in payment for it. After making these payments in advance, the petitioners had ro longer any title to the money paid, nor any claim upon the Museum for it. No debt was created in their favor. Their equitable title was to the land. If they failed to perform their contract, the Museum might hold the money as forfeited, unless it elected to demand specific performance. Under this arrangement, the petitioners had no money at interest, within the meaning of the statute, even though a payment was to be made to them in the final settlement which is referred to in the contract as interest. It follows that they were not taxable for the money advanced under their contract, in part payment for the land, and that they are entitled to an abatement of the tax.

We have now to consider the extent of the abatement. The question arises from the fact that the petitioners are trustees of an association of shareholders in an enterprise for the purchase, improvement and management of real estate for gain. If their relation to the certificate holders was merely that of trustees and cestuis que trust, the interest of each beneficiary in the trust estate would be taxable in the city or town of his residence, if within the Commonwealth. St. 1909, c. 490, Part I. § 23, cl. 5. (R. L. c. 12, § 28, cl. 5.) If the certificate holders in this trust are partners within the meaning of section twenty-seven of the chapter just cited, their property was all taxable in the city of Boston, where their business was carried on.

There is no doubt that they are joint owners of the property, for whose joint benefit the business is being carried on, in which profits or loss will affect them all proportionally through the increase or diminution of the value of their respective interests in the trust. There is a provision in the agreement of trust that neither they nor the trustees are to be liable personally for the debts of the trust, and in this respect their relation to the business is like that which appeared in *Hussey* v. *Arnold*, 185 Mass. 202. In *Gleason* v. *McKay*, 184 Mass. 419, and in *Phillips* v. *Blatchford*, 137 Mass. 510, similar trust agreements were held to create partnerships. We do not think the provision exempting



the certificate holders from personal liability for debts should be held to defeat the application of this section to the trust as a partnership. The decisions already made hold that the transferable quality of their interests and other provisions for conducting the business, similar to those of corporations, do not prevent their relation from being that of partners. In the leading and substantive features that distinguish ordinary partnerships, this association is within the spirit and meaning of the law of partnership. The limitations upon the power and liability of individual members and the attempt to avail themselves of many of the privileges of stockholders in corporations relate more to details and to the machinery of management than to the substantive purposes of the enterprise.

There are reasons of policy why the members should be held to be partners within the meaning of this section, for as such trusts are not regulated by statute, and no returns are required of them, interests in them held by non-residents of the city or town where their business is conducted would be liable to escape taxation unless the property is taxed in the firm name.

We are of opinion that all the personal property of the trust was rightly taxed in the city of Boston, and that the abatement should be allowed only by reason of the tax upon property in the hands of the Museum of Fine Arts.

Order for abatement accordingly.

J. B. Warner & C. A. Williams, for the petitioners.

T. M. Badeon, for the respondent.

Frederick W. Dallinger, administrator, vs. Lizzie Morse.

Suffolk. March 7, 1911. - April 4, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Probate Court. Executor and Administrator. Statute, Construction. Words, "Undistributed."

The strict rules of common law pleading usually are not applied to proceedings in the Probate Court.

B. L. c. 187, § 4, is as follows: "If administration has not been taken on the estate of a testator or intestate within twenty years after his decease, and any property or claim or right thereto remains undistributed or thereafter accrues to such estate and remains to be administered, original administration may for cause be granted, but such administration shall affect no other property." Held, that under this statute property of an intestate which "remains undistributed" is property which actually has not been distributed among the persons entitled to it as next of kin, and includes a dividend from the receiver of a savings bank, in which the intestate had a deposit, which has been paid to the treasurer of the Commonwealth as due on the deposit of the intestate nearly thirty years after the death of the intestate, when no administration of his estate ever has been applied for or issued; and in such a case administration may be granted under the statute quoted above.

Where the Probate Court has power to appoint an administrator and makes such an appointment, but the person appointed resigns without performing his duties although there is property of the estate of his intestate to be administered, it necessarily follows that the Probate Court has jurisdiction to appoint an administrator de bonis non.

The validity of the appointment of an administrator by the Probate Court, where the court had jurisdiction to make the appointment, cannot be questioned in an action brought by the administrator to recover money in the hands of the defendant alleged to belong to the estate of the plaintiff's intestate.

CONTRACT by the alleged administrator de bonis non of the estate of Nellie E. Morse, otherwise known as Nellie Morse, against Lizzie Morse, otherwise known as Lizzie H. Morse, for \$996.83 with interest thereon from October 11, 1906. Writ dated June 2, 1908.

The declaration alleged that by a decree of the Probate Court for the county of Middlesex made on May 21, 1908, the plaintiff was appointed administrator of the goods not already administered of Nellie E. Morse, otherwise known as Nellie Morse, late of Natick, by virtue of which the plaintiff became entitled to the personal estate of the late Nellie E. Morse; that the defendant on or about October 1, 1906, obtained from the treasurer and receiver general of the Commonwealth a check or order for the sum of \$996.83 payable to the estate of Nellie Morse; that the defendant falsely and without authority or right indorsed this check or order as follows: "Estate of Nellie Morse, by Lizzie Morse, Executrix," and deposited it to the defendant's own credit in the Suffolk Savings Bank for Seamen and Others; wherefore, it was alleged, the defendant owed the plaintiff the sum of \$996.83 with interest from the day of deposit, October 11, 1906, as money had and received by the defendant to the plaintiff's use as administrator de bonis non.

In the Superior Court the case was submitted to Ray-

mond, J., without a jury, upon the following agreed statement of facts:

The plaintiff alleged himself to be the administrator de bonis non of the estate of one Nellie E. Morse late of Natick in the County of Middlesex, deceased. Nellie E. Morse died at Natick on June 10, 1874, intestate, at the age of nineteen years, leaving no husband and as her only heirs at law and next of kin a father and mother.

During the lifetime of Nellie E. Morse her father had deposited in her name in the Framingham Savings Bank a sum of money. This deposit remained in that bank until March 8, 1898, when the bank went into the hands of a receiver. On January 2, 1904, the receivers of the Framingham Savings Bank paid to the treasurer and receiver general of the Commonwealth the sum of \$996.88, the amount then due on the deposit of Nellie E. Morse. At the time of her death Nellie E. Morse had never been married, owed no debts, and was possessed of no real estate. No administration was applied for on her estate until May, 1906. On May 17, 1906, one Nutt of Natick petitioned the Probate Court for the county of Middlesex to be appointed administrator of the estate of Nellie E. Morse, and by a decree of that court dated September 10, 1906, he was appointed such administrator. Nutt as administrator caused no appraisal of the estate to be made and resigned before filing any account. Upon the resignation of Nutt the plaintiff was appointed by the Probate Court for the county of Middlesex administrator de bonis non of the estate of Nellie E. Morse, the decree appointing him being dated May 21, 1908.

If upon the facts set forth administration was legally granted upon the petition of Nutt and upon the petition on which the plaintiff was appointed, judgment was to be entered for the plaintiff in the sum of \$996.83, now in the hands of the Suffolk Savings Bank for Seamen and Others, and accrued interest thereon to be computed from the date of deposit in that bank by the defendant on October 11, 1906; otherwise, judgment was to be entered for the defendant.

The judge found for the plaintiff in the sum of \$1,140; and ordered judgment accordingly. From the judgment entered pursuant to this order the defendant appealed.

The case was submitted on briefs.

J. P. Dexter, for the defendant.

F. W. Dallinger & T. W. Cunningham, for the plaintiff.

SHELDON, J. The fundamental question in this case is as to the jurisdiction of the Probate Court to grant in 1906 original administration upon the estate of Nellie E. Morse, who had died in 1874. R. L. c. 137, § 3. It is provided by § 4 of the chapter just cited that "if administration has not been taken on the estate of a testator or intestate within twenty years after his decease, and any property or claim or right thereto remains undistributed or thereafter accrues to such estate and remains to be administered, original administration may for cause be granted, but such administration shall affect no other property." Nutt's petition for the grant of administration averred that there were funds in the hands of the State treasurer amounting to about \$1,000 which remained to be administered, and which the State auditor was unwilling to pay to any one but an administrator; and this must now be taken to have been proved in the Probate Court. The averment of the petition, though not in the precise statutory form, was fully equivalent thereto; for money in the hands of the State officials could not have been distributed within the meaning of the statute. The strict rules of common law pleading are not usually applied to proceedings in the probate courts. Codwise v. Livermore, 194 Mass. 445.

The defendant contends that the word "undistributed" means only undistributed by an administrator. But that is limiting too narrowly the language of the Legislature. They have given the power to grant administration in all cases where property of an intestate "remains undistributed," that is, has not been actually divided among and put into the control of the persons entitled as next of kin. The limitation contended for would prevent the distribution of the personal property in a case like the present one, or in any case in which, as sometimes has been done, the next of kin have amicably divided among themselves all the known property of an intestate without the formality of an administration, and after the lapse of more than twenty years it is discovered that personal property to a considerable amount has been overlooked and "remains undistributed."

We think it plain that the Probate Court had jurisdiction to

make the appointment in 1906. Accordingly it had jurisdiction, upon the death of the original administrator without having administered upon this fund, to appoint the plaintiff to be administrator de bonis non. Bancroft v. Andrews, 6 Cush. 493, 495.

As there was jurisdiction to make these appointments, their validity is not open to collateral attack in this action. McCooey v. New York, New Haven, & Hartford Railroad, 182 Mass. 205. Tobin v. Larkin, 187 Mass. 279. Connors v. Cunard Steamship Co. 204 Mass. 810. And if this were not so, we see no reason to doubt that the action of the Probate Court in making these appointments was properly taken and was correct.

The judgment for the plaintiff must be affirmed.

So ordered.

WILLIAM P. TODD vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 8, 1911. - April 4, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Practice, Civil, Conduct of trial, Exceptions.

In an action of tort for personal injuries, where the judge in his instructions to the jury makes a remark tending to disparage the testimony of the plaintiff and his witnesses in regard to the effect of the alleged injuries upon the plaintiff's physical condition, and, upon objection and exception by the plaintiff's counsel, tells the jury that on account of such objection he withdraws the remark, and the jury return a verdict for the defendant, the plaintiff has no ground for exception, the remark, even if it had not been withdrawn, relating only to the question of damages and having been made immaterial by the verdict for the defendant on the question of liability.

RUGG, J. This is an action of tort to recover compensation for personal injuries. The plaintiff alone testified as to liability. Evidence as to his injuries was given by several of his relatives as well as by himself. The presiding judge * of the Superior Court gave instructions, to which no exception was taken, as to due care and negligence. In the part of the charge touching

^{*} Brown, J.

damages he said, "You will notice in all of these cases that, when the testimony comes from the family of the plaintiff, the plaintiff was the most perfect specimen of manhood, imaginary, before the accident, and is the most abject specimen after the accident." To this an exception was duly saved by the plaintiff, whereupon the judge said, "Mr. Sherman thinks what I said about the family testifying doesn't apply to this case, and I withdraw it." To this also the plaintiff excepted. The jury returned a verdict for the defendant.

It is a principle of practice in the trial of causes to a jury that an erroneous ruling made by the presiding judge either as to evidence or in the charge may be corrected at any stage, and if the ruling as made at last is sound no exception lies. It must be assumed that the jury acted upon the state of the case finally submitted to them both as to evidence and instructions. Where a material mistake of law has been made, the party who has objected seasonably cannot be deprived of an exception unless the judge unmistakably makes right the earlier wrong. portion of the charge here criticised related to damages alone, a subject which the verdict for the defendant on liability has rendered immaterial. Moreover the judge said, when objection was made to the language he had used, "I withdraw it." The prefatory remark giving as the reason that counsel for the plaintiff thought it did not apply to the case does not impair the taking back. Eldridge v. Hawley, 115 Mass. 410. Maguire v. Middlesex Railroad, 115 Mass. 239. Rudberg v. Bowden Felting Co. 188 Mass. 365. Everson v. Casualty Co. of America, ante, 214.

It was urged in argument that the accent of the two statements to which objection was made, was such as to prejudice the plaintiff. The tone of voice of a presiding judge is not subject to exception, unless some error of law is committed. Beal v. Lowell & Dracut Street Railway, 157 Mass. 444.

Exceptions overruled.

R. H. Sherman, for the plaintiff.

F. Ranney (E. B. Horn with him,) for the defendant

WILLIAM L. SELLON vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 10, 1911. — April 4, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Negligence, In use of highway. Street Railway.

If a traveller on a highway, who is driving one horse in a light express wagon, turns at a right angle to cross the parallel tracks of a street railway, when he sees on the farther track a car five hundred feet away stop to let off a passenger and then start toward him, and proceeds to walk his horse across the tracks, observing when he is on the first track that the car is from three hundred to three hundred and fifty feet away and has increased its speed considerably, and, when he himself is between the two tracks and the horse is over, sees the car two hundred feet away, and if the car is going at a high rate of speed which does not diminish until the car strikes one of the hind wheels of the wagon, and then the car runs one hundred feet farther without stopping, these facts, if shown in evidence in an action by the traveller against the corporation operating the street railway, entitle the plaintiff to go to the jury on the questions whether he was in the exercise of due care and whether the motorman was negligent.

Where a traveller on a highway, who is driving a horse in a light wagon, attempts to cross the parallel tracks of a street railway, on the second of which a car is approaching rapidly although some distance away, and where for a long distance the street is straight, the view is unobstructed and there are no diverting or confusing surroundings to prevent the motorman from seeing him and retarding the car sufficiently to avoid a collision, it cannot be said that such traveller as matter of law fails to exercise due care because he miscalculates the time required for passing safely in front of the car and one of the hind wheels of his wagon is struck by the car.

TORT for personal injuries sustained in falling from a wagon in which the plaintiff was driving, when one of its hind wheels was struck by a car of the defendant on Blue Hill Avenue in Boston on December 18, 1906, at about twenty minutes after four o'clock in the afternoon. Writ dated August 21, 1907.

In the Superior Court the case was tried before Dana, J. The facts which could have been found on the conflicting evidence are stated in the opinion.

At the close of the evidence, the defendant asked the judge to rule as follows:

1. Upon all the evidence, your verdict must be for the defendant.

- 2. The evidence does not warrant a finding that the plaintiff was in the exercise of due care.
- 8. The evidence does not warrant a finding that the defendant was negligent.
- 4. As the plaintiff was driving along the left hand roadway of Blue Hill Avenue instead of the right hand roadway, he cannot recover.

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$7,500, which on the defendant's motion for a new trial on the ground of excessive damages was reduced to \$6,000. The defendant alleged exceptions.

- A. A. Ballantine, for the defendant.
- W. M. Hurd, (H. Siskind with him,) for the plaintiff.
- RUGG, J. This is an action of tort brought by a traveller upon a public way to recover compensation for personal injuries received by reason of a collision with a car of the defendant.

There was evidence to the effect that there were double tracks of the defendant in the middle of Blue Hill Avenue, in a reserved space covered with grass and for the most part separated from the wagon way on each side by curbing, except that there was a paved space across the tracks opposite Norfolk Street, a street diverging toward the east. The plaintiff drove in a light express wagon with one horse into the avenue from the west, and proceeded northerly on its left side to the paved space, when he turned to cross into Norfolk Street. He then saw a car on the easterly track, five hundred feet northerly from him, stop, to let a passenger alight, and start toward him, while he walked his horse across the tracks. When the horse was on the tracks he observed that the car was from three hundred to three hundred and fifty feet away and "had increased its speed considerably," and when his own person was between the two tracks and "the horse was over" the car was two hundred feet away, and that was the last he remembered. The car was going at a high rate of speed, which did not diminish until it struck a rear wheel of the plaintiff's wagon and it then ran one hundred feet before stopping.

There was much evidence tending to controvert this narration, and to show that the accident happened in a wholly different place

and way. Its weight upon the printed record appears to show that causes entirely disconnected from neglect of the defendant produced the injury. But these considerations were for the jury, and for the trial judge upon the motion for a new trial. The verdict for the plaintiff cannot be set aside unless upon the view of the evidence most favorable to the plaintiff it can be said as matter of law that there was no proof of the due care of plaintiff or of the negligence of the defendant's motorman.

The principles of law which govern the relative rights and obligations of drivers of vehicles and those in charge of trolley cars, travelling upon a highway, are that neither has an exclusive right of way upon any part of the street, and that each may within reasonable limits rely on due regard for his safety by the other, subject only to the limitation that there shall be no unreasonable interference with the progress of the trolley car, which from the nature of things can progress only upon its The defendant argues that while the vocal testimony of the plaintiff may show due care on his part, yet the evidence springing from his actions and the undisputed circumstances demonstrates that he failed to take any heed for his safety, and that the only reasonable inference is that he drove slowly upon the tracks in face of a rapidly on-coming car, so near at hand as to stamp as reckless an attempt to pass in front of it, that, if he looked at all, he was negligent in not perceiving the danger, and that the case is governed by Fitzgerald v. Boston Elevated Railway, 194 Mass. 242, and Willis v. Boston & Northern Street Railway, 202 Mass. 463.

There is much force in this contention, and the case is close. But in the light of all the attendant conditions, it does not quite appear to be impossible to reach any other rational conclusion than that the plaintiff was careless. The street was straight for a long distance, the view was unobstructed, and there were no diverting or confusing surroundings. The wagon had almost reached a place of safety, and the speed of the car may have been found to have been such that a slight slowing would have averted a collision. A miscalculation of the time required for passing safely in front of the car under these circumstances does not necessarily as matter of law constitute want of due care. Wood v. Boston Elevated Railway, 188 Mass. 161. Jeddrey v.

Boston & Northern Street Railway, 198 Mass. 232. Fallon v. Boston Elevated Railway, 201 Mass. 179. Hatch v. Boston & Northern Street Railway, 205 Mass. 410. Carroll v. Boston Elevated Railway, 205 Mass. 429. Eustis v. Boston Elevated Railway, 206 Mass. 141.

Exceptions overruled.

ELIPHALET J. FOSS vs. ZACCHEUS R. ATKINS & others.

Barnstable. March 10, 1911. — April 4, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Land Court. Practice, Civil, Exceptions. Supreme Judicial Court.

The denial by a judge of the Land Court of a motion for a rehearing upon a petition in that court is within the discretion of the judge and is not the subject of exception.

The denial by a judge of the Land Court of a motion to vacate a part of a previous decision or finding of that court and to enter a new decision as to that part is within the discretion of the judge and is not the subject of exception.

The provision of R. L. c. 159, § 24, under which in cases of accident or mistake the full court may grant leave to parties to exhibit further evidence, applies only to cases that come to this court by appeal and is not applicable to a case which comes before the court upon a bill of exceptions.

Sheldon, J. In the last decision of this case, reported in 204 Mass. 387, it was held that the final decree which the Land Court had attempted to enter upon its finding of fact was beyond the power of that court and was void, and that the petitioner had still the right to withdraw his petition upon terms to be fixed under R. L. c. 128, § 36, but that it was for the Land Court to determine whether he could have his petition dismissed as to that part of the land to which it had been found that he had no title. See now St. 1910, c. 245. Thereupon the Land Court passed its order of January 20, 1910. This was done

That order was as follows: "That if the petitioner shall, on or before the twenty-sixth day of January, current, file a motion to sever his application so as to go on to a decree for registration of title to that tract of land as to which title was found to be in the petitioner and proper for registration by the decision of this court, filed on February 16, 1906, there may be a decree for the petitioner as to the tract so severed and dismissing the application as to the rest of the land described therein; and if the petitioner does not file a motion to sever within the time above allowed, then let a decree issue of 'petition dismissed.'"

apparently without objection; certainly the order was neither appealed from nor excepted to. On the next day, January 21, the petitioner in compliance with this order filed a motion "that his petition be severed, and so much of the land therein described as was found by the decision of February 16, 1906, to be in him be registered in said petitioner." This motion was allowed; but at the petitioner's request the entry of a decree thereon was postponed pending negotiations for a settlement. The case was now ripe for a decree, and as the record then stood there was only one decree that could be entered.

No further proceedings were had for about ten months. Then the petitioner filed a motion for a rehearing on his petition and also a motion that the decision (or finding) of February 16, 1906, be vacated in so far as it found for the respondent, and that a new decision be entered as to that part of the land. These motions were denied * after hearing, and the petitioner excepted.

These motions, like a motion for a new trial in the Superior Court, were addressed to the discretion of the judge of the Land Court, and no exception lies to his exercise of that discretion. Brady v. American Print Works, 119 Mass. 98, and cases there cited. Nichols v. Nichols, 136 Mass. 256. Hill v. Greenwood, 160 Mass. 256. It does not appear that any rulings of law made at the hearing of these motions were excepted to.

Nothing is to be found on the record before us or in our previous decisions (198 Mass. 486; 201 Mass. 158; 204 Mass. 887) which required as matter of law the vacation of the findings or the granting of a new trial. It is not shown what facts appeared or what rulings of law were made at the hearing. The case comes before us only upon exceptions, not upon such an appeal as is referred to in R. L. c. 159, § 24, and the provisions of that statute as to the exhibition of further evidence are not applicable.

Exceptions overruled.

- P. M. Foss, for the petitioner.
- G. A. King, for the respondents, submitted a brief.

^{*} By Davis, J.

Annie McCarthy v. Boston Elevated Railway Company.

Suffolk. March 14, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.

Negligence, Street railway. Evidence, Presumptions and burden of proof.

At the trial of an action by a woman against a street railway company, if the plaintiff is the only witness on the question of liability and in her direct examination
testifies that, while, in full sight of the conductor, she was attempting to board
a box electric street car of the defendant when it was at a standstill and had
put her foot upon the second step of the rear entrance and had hold of the handle
of the door, the conductor gave the signal for the starting of the car and the car
started so suddenly as to break her hold and throw her down and injure her,
the questions, whether the plaintiff was in the exercise of due care, and whether
the motorman and the conductor, either or both, were negligent, are for the
jury.

If the plaintiff is the only witness in his own behalf at the trial of an action and the facts testified to by him in direct examination will warrant the submission of the case to the jury, statements made by him in cross-examination which are in some respects in conflict with those made in direct examination will not prevent the case being so submitted, such a conflict being simply a matter for the jury to weigh.

TORT for personal injuries alleged to have been received by the plaintiff from being thrown down by the starting of a box electric street car of the defendant while she was in the act of entering it. Writ dated March 5, 1908.

In the Superior Court the case was tried before Dana, J. The plaintiff was the only witness who testified as to facts bearing on the question of liability of the defendant. The facts are stated in the opinion. "At the close of the plaintiff's case the presiding judge ordered a verdict for the defendant without requiring the defendant to rest, and at the request of the plaintiff reported the case for the determination of the full court, — if the ruling was right, judgment to be entered on the verdict; if wrong, the case to be remanded for a new trial."

- F. P. Garland, for the plaintiff.
- F. M. Ives, for the defendant.

SHELDON, J. Taking the evidence, as upon this report it must be taken, most favorably for the plaintiff, the jury could have found that she attempted to board the defendant's car in

full sight of the conductor and while it was at a standstill; but that before she had got fairly upon the car, as soon as she had put her foot upon the second step at the rear entrance, the conductor gave the signal for the car to start, and it started with so sudden and violent a jerk as to throw her down and injure her, although as might have been found she had hold upon the handle of the door. From these facts, the jury could draw the inferences that she was in the exercise of due care, that the conductor was negligent in starting the car before she had reached a place of safety upon it, and, if her hold was so broken, that the motorman was negligent in the manner in which he started the car. Rand v. Boston Elevated Railway, 198 Mass. 569. Lacour v. Springfield Street Railway, 200 Mass. 84. Ryan v. Pittsfield Electric Street Railway, 208 Mass. 283. Tupper v. Boston Elevated Railway, 204 Mass. 151. Black v. Boston Elevated Railway, 206 Mass. 80, 81. Work v. Boston Elevated Railway, 207 Mass. 447.

That the plaintiff's testimony on cross-examination differed in some respects from her statements on direct examination was simply a matter for the jury to weigh.

Under the terms of the report there must be a new trial.

So ordered.

MARY SCANNELL vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 16, 17, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.

Practice, Civil, New trial.

It is the right and duty of a judge preciding at the trial of a civil case to set aside the verdict of the jury when in his judgment it is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence but was the product of bias, misapprehension or prejudice, and the exercise of such discretion by the judge who presided at the trial of an action of tort by a woman against a street railway company for injuries, received while the plaintiff was alighting from a car of the defendant and alleged to have been caused by an unwarranted starting of the car, where the plaintiff was the only witness as to the happening of the accident and her story seemed to the judge so improbable and absurd that it could not command the credence of any right minded men, cannot be revised by this court. 88

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TORT for personal injuries alleged to have been caused by the starting of an electric street car of the defendant as the plaintiff was in the act of alighting. Writ dated January 11, 1908.

In the Superior Court the case was tried before Harris, J. The plaintiff was the only witness who testified in regard to the accident. She testified that, in the act of attempting to alight, "she put her right foot on the step, and was about to put her left foot on the ground, having hold of the rear grab handle with her right hand, her left foot touching or almost touching the ground, when the conductor started the car forward, twisting her around, but not throwing her to the ground, thereby spraining her left ankle, tearing the ligaments, and fracturing the astragalus." Physicians testified that the accident as described by the plaintiff would be a sufficient cause for the injuries she complained of.

There was a verdict of \$1,100 for the plaintiff. The defendant moved for a new trial on the grounds that the verdict was against the evidence, that the verdict was against the weight of the evidence, and that the damages awarded were excessive. At a hearing on the motion after a partial review of the evidence, the judge said his only difficulty with the case was that he could not understand why the plaintiff was not thrown to the ground, if the accident happened as the plaintiff testified that it did. He therefore allowed the motion for a new trial, set the verdict aside and ordered a new trial. The plaintiff alleged exceptions.

T. J. Ahern, (J. L. Keogh with him,) for the plaintiff.

E. P. Saltonstall & C. W. Blood, for the defendant, were not called upon.

SHELDON, J. It is the right and duty of a judge presiding at the trial of a civil case to set aside the verdict of the jury when in his judgment it is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice. R. L. c. 173, § 112. Aiken v. Holyoke Street Railway, 180 Mass. 8, 11, 12. In the case at bar, the plaintiff herself was the only witness who testified to the happening of the accident by which she claimed to have been injured. If under the circumstances her story seemed to the judge to be so improbable and absurd that

it could not command the credence of any right minded men, he had the right in the exercise of his judicial discretion to set aside the verdict in her favor. We cannot revise the exercise of his discretion. Parker v. Griffith, 172 Mass. 87, 88. Hayward v. Langmaid, 181 Mass. 426, 427. Greene v. Farlow, 188 Mass. 146, 147. Welsh v. Milton Water Co. 200 Mass. 409, 411. Loveland v. Rand, 200 Mass. 142.

Exceptions overruled.

WILLIAM J. O'BRIEN, JR., trustee, vs. GEORGIANNA K. LEWIS & others.

Suffolk. March 17, 1911. - April 4, 1911.

Present: Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.

Trust, Construction. Devise and Legacy. Equitable Conversion. Executor and Administrator.

- A testator by his will gave to a trustee a certain parcel of real estate and a certain sum of money in trust to pay the income thereof to a nephew during his life and after his death to the nephew's daughter, naming her, for her life "and to her children in fee simple, if she leaves issue, but if she dies without issue, at her decease, said real estate" and money "shall go to my heirs at law, discharged of all trusts." No conversion of the real estate into personal property was ordered in the will. The nephew's daughter died first after the testator, leaving a husband and a son. The son then died, and then the testator's nephew. Held, that the testator intended the property, upon the termination of the two life estates, to go absolutely to the children of the nephew's daughter, if she had any, and that it was only upon her death without issue then living that the alternative limitation to the testator's heirs was to take effect, and therefore that upon her death the entire beneficial interest in remainder vested absolutely in her son, and upon his death it passed to his father.
- A testator by his will gave to one S. certain real estate and a certain sum of money in trust to pay the income to the testator's nephew Z. during his life and then to a designated daughter of the nephew and after her death to her children in fee if she should leave issue, but if she should die without issue, then to the testator's heirs at law, discharged of all trusts. There was no other trust provision in the will. By a codicil the testator divided the residue of his estate into three equal parts and as to one part gave this direction: "to my nephew Z. one part subject to the same trusteeship and conditions as stated in my will."

 Held, that the effect of the quoted language in the codicil was to incorporate into the direction as to the residuary estate in the codicil the limitations of successive equitable estates set out explicitly in the will.
- A testator by his will gave real estate and personal property in trust to pay the income thereof to a nephew during his life and after his death to the nephew's daughter, naming her, for her life "and to her children in fee simple, if she leaves issue, but if she dies without issue, at her decease, sald real estate " and money

"shall go to my heirs at law, discharged of all trusts." No conversion of the real estate into personal property was ordered in the will. The nephew's daughter died first after the testator, leaving a husband, and a son who died when less than seven years old leaving his father surviving him. The trustee turned all the real estate into money and invested it, partly in other real estate and partly in personal property. The testator's nephew then died, and, an administrator of the estate of the son of the nephew's daughter having been appointed, the trustee sought instructions as to the final disposition of the trust fund. It having been held, that on the death of the nephew's daughter an absolute interest in remainder in the trust fund became vested in her son, it further was held that, a conversion of the real estate into personalty not having been ordered by the testator, each kind of property in the trust fund should be treated as retaining its original character until it should come into the hands of one entitled to treat it as his own absolutely and for all purposes; and therefore that such of the trust fund as represented proceeds of what at the death of the testator was real estate should be transferred to the husband of the nephew's daughter absolutely, and such of it as was the proceeds of personal property should be transferred to the administrator of her son's estate. It however was intimated that, since the husband was at the same time the heir at law and the sole next of kin of the son, and the son had died at so tender an age, the whole fund might safely have been paid to the husband had no administration been taken upon the son's estate.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 6, 1910, and subsequently amended, by the trustee under the will of Joseph Zane, late of Boston, for instructions.

Among the provisions of the will were the following:

"I give devise and bequeath to John Grace Suman, of Baltimore, Md., my real estate corner of Baltimore and Carey Streets, in said Baltimore, containing about fifteen hundred square feet of land and the buildings thereon, and the sum of twenty thousand dollars, in trust nevertheless, for the uses and purposes following to Wit, the annual income of said real estate and of said twenty thousand dollars shall be paid by said trustee, quarterly, to my nephew, Joseph Zane of said Baltimore, for the full term of his natural life, and after his decease, the remainder of said real estate and said twenty thousand dollars shall go to Sarah Clarinda Zane, daughter of said Joseph Zane, (my grand niece) during the term of her natural life and to her children in fee simple, if she leaves issue, but if she dies without issue, at her decease, said real estate and said twenty thousand dollars shall go to my heirs at law, discharged of all trusts."

In a codicil was the following:

"All the residue of my estate, real, personal and mixed, wheresoever it may be found, and of whatsoever it may consist, I desire it to be divided into three equal parts, and disposed of as follows:



- "To my nephew Joseph Zane one part subject to the same trusteeship and conditions as stated in my will of March 31st 1896.
 - "To my niece Ellen Amelia Zane Clairage one part.
 - "To my niece Georgeanna Kelly, one part."

The trustee named in the will declined to serve and the plaintiff was appointed in his stead. The testator died on February 14, 1902. Sarah Clarinda Zane married one Pinckney T. Payne and died on September 20, 1905, leaving surviving her one child, Pinckney T. Payne, Jr. Pinckney T. Payne, Jr., died on December 24, 1908, at the age of six years, three months and eleven days. Joseph Zane, mentioned in the will and codicil, died on March 21, 1909.

The bill alleged that the plaintiff was "prepared to pay over the trust property in his hands to whomsoever shall be found to be entitled thereto, but that he had been requested, both by Pinckney T. Payne and also by the other defendants, heirs at law of the testator, to pay the property over to them, respectively"; and he sought instructions regarding whom the trust fund was payable to under the circumstances.

Other facts are stated in the opinion. The case was heard by Hammond, J., upon an agreed statement of certain facts and an offer of proof as to the determination of the same questions by the courts of Maryland, as stated in the opinion. The justice found the facts set out in the offer of proof to be true, but reserved for the full court all questions of the materiality and admissibility of the same; and reserved the case for determination by the full court on the pleadings, the agreement as to certain facts, and the facts set forth in the offer of proof, so far as they, or any of them, might be found by the full court to be material and admissible.

- J. C. Pelletier, for the trustee, stated the case.
- G. W. Reed, (J. S. Richardson with him,) for Georgianna K. Lewis and others, heirs at law of the testator.
- G. R. Nutter, (W. H. Taylor & J. J. Kaplan with him,) for Walter H. Taylor, administrator of the estate of Pinckney T. Payne, Jr.
 - A. T. Wright, for Pinckney T. Payne, submitted a brief. SHELDON, J. The beneficial enjoyment of the real estate and

the money which were given by the will to John Grace Suman in trust was to be in Joseph Zane for life and then in his daughter Sarah for her life, with remainder in fee to her children if she should leave issue, but if she should die without issue, then to the testator's heirs at law, discharged of all trusts. If it is apparent from the language used by the testator what interest he intended to give to the children of Sarah Zane, and if his intent can be carried out consistently with the rules of law, we ought so to construe his language as to give effect to that intent. Heard v. Read, 169 Mass. 216. McCurdy v. McCallum, 186 Mass. 464. Crapo v. Price, 190 Mass. 317, 319, 320. Boston Safe Deposit & Trust Co. v. Blanchard, 196 Mass. 35, 38. Jewett v. Jewett, 200 Mass. 310, 317. Ware v. Minot, 202 Mass. 512, 516. Robison v. Female Orphan Asylum of Portland, 128 U.S. 702. Looking at the language of the will, it is plain that he intended the property, upon the termination of the two life estates, to go absolutely to Sarah Zane's children if she had any, and that it was only upon her death without issue then living that the alternative limitation to his own heirs was to take effect. Sarah's death during the lifetime of Joseph would simply advance the period of enjoyment of her children if she should leave any, or of the testator's heirs if she should fail to do so. intention is not repugnant to any rule of law; a similar intent expressed by other testators often has been carried out by the courts. Jacobs v. Whitney, 205 Mass. 477. Cook v. Hayward, 172 Mass. 195. Marsh v. Hoyt, 161 Mass. 459. Kimball v. Tilton, 118 Mass. 311. Moore v. Matthews, 4 Rob. (N. J.) 873. Her son Pinckney was living at the death of his mother, and then at any rate he took an absolute interest in remainder. Comerbach v. Perryn, 3 T. R. 484. Van Giesen v. White, 8 Dick. 1. Robison v. Female Orphan Asylum of Portland, 128 U. S. 702. The nature and extent of his interest before that time need not be considered.

The bequest by the codicil to Joseph Zane of one third part of the residue of the estate was made "subject to the same trusteeship and conditions" as had been stated in the will. This language can refer to nothing but the limitations and provisions stated in the bequest to Suman in trust. Its effect is to incorporate into the residuary bequest the limitations of successive equitable life estates to Joseph and Sarah Zane, with an absolute remainder to her children if she should leave any, and otherwise to the testator's heirs. This is the plain meaning of the words used, and is supported by many decisions in which language more or less similar was passed upon. Osborne v. Varney, 7 Met. 801, 303. Pendleton v. Larrabee, 62 Conn. 393. Baker v. Lorillard, 4 N. Y. 257. Longdon v. Simson, 12 Ves. 295. Ross v. Ross, 2 Coll. Ch. 269. Davies v. Hopkins, 2 Beav. 276. Ord v. Ord, L. R. 2 Eq. 893. Sweeting v. Prideaux, 2 Ch. D. 413. Smith v. Greenhill, 14 Weekly Rep. 912. Ashburnham v. Ashburnham, 18 Jur. 1111.

We have carefully considered the strong argument that was addressed to us in behalf of the testator's heirs at law, and have examined all the authorities to which we have been referred; but we can reach no other conclusion than that which has been stated. We are confirmed therein by the fact that the same view has been taken of the rights of the parties under this will and codicil by the highest court of Maryland in a very clear and able opinion. Lewis v. Payne, 113 Md. 127. All the parties now before us except the administrator in this Commonwealth of the estate of Pinckney T. Payne, Jr., were before the court; the same claims were made and determined there as here; and the same conclusion was arrived at that we have reached. We have not needed therefore to determine whether that decision was binding here upon these parties. It is at least true that even if the questions raised had seemed to us to be doubtful. as has not been the case, we ought not without strong reasons to have differed from it. Rackemann v. Wood, 203 Mass. 501.

The right to this trust fund became vested in Pinckney T. Payne, Jr. He has died, leaving his father his sole heir and next of kin. It may be that if no administration had been taken upon the son's estate, especially as he died at so tender an age, the whole fund safely could have been paid to his father. Buswell v. Newcomb, 183 Mass. 111. Minot v. Purrington, 190 Mass. 336. See also Moore v. Monroe County, 59 Ind. 516; Hargroves, v. Thompson, 31 Miss. 211. But as the facts now are the father is entitled absolutely to the real estate and the administrator of the son's estate to the personal property. It appears

that the testator had merely a leasehold interest in the land specifically bequeathed by the will, and that, though erroneously called real estate in the will, it was really personal property. O'Brien v. Clark, 104 Md. 30. Some real estate however passed to the trustee under the residuary bequest, and this has been turned into money and invested partly in real and partly in personal property. Under these circumstances, a conversion not having been ordered by the testator, each kind of property in the trust fund should be treated as retaining its original character until it shall have come into the hands of one who is entitled to treat it as his own absolutely and for all purposes. Whittemore, 192 Mass, 367, 384, and cases cited. The part of the trust fund as it now exists which consists of the proceeds of real estate should be transferred to Pinckney T. Payne in fee simple, and that part which is the proceeds of personal property should be paid to the administrator of the estate of Pinckney T. Payne, Jr. The trustee must be instructed accordingly.

So ordered.

Annie Regan, administratrix, v. Boston and Maine Railboad.

Middlesex. March 28, 1911. — April 4, 1911.

Present: Knowlton, C. J., Morton, Hammond, Brally, & Rugg, JJ.

Negligence, Employer's liability, In railroad yard.

At the trial of an action by an administrator against a railroad corporation, the former employer of his intestate, to recover under R. L. c. 106, § 71, cl. 2, 8, § 72, for the conscious suffering and death of the intestate, there was evidence tending to show that the intestate when injured was a foreman of a section gang of the defendant and was working in a railroad yard, where there were frequent shiftings of cars and passing of locomotives, in repairing a track called "thirteen," adjoining and branching from another track called "fifteen"; that the conductor of a shifting crew of the defendant asked the intestate if he could set two cars in on track "thirteen," that the intestate answered, "Yes, you can, but you can't bother me any more until I have this job done," and that the conductor replied, "All right," and soon after put two cars on track "thirteen"; that half an hour later by the conductor's direction a car was shunted on to track "fifteen" which struck the intestate as he was working on track "thirteen" near where the two tracks joined and where they were from ten to eighteen inches apart. Held,

that the case was one for the jury, since, in view of the conversation with the conductor, the plaintiff's intestate might have been found to have been relieved of the duty of watchfulness as to cars coming from the conductor's shifting crew.

Torr by the administratrix of the estate of one Michael Regan to recover for the conscious suffering and death of the plaintiff's intestate, which occurred in the Bleachery freight yard, so called, in Lowell on June 24, 1908, the declaration containing two counts, the first alleging under R. L. c. 106, § 71, cl. 8, as the cause of the conscious suffering and death, negligence of some person in the service of the defendant who was in charge or control of a signal, switch, locomotive engine or train upon the defendant's railroad, and the second count under cl. 2 alleging as the cause the negligence of a person in the service of the defendant, who was entrusted with and exercising superintendence, and whose sole or principal duty was that of a superintendent, or, in the absence of such superintendent, of a person acting as superintendent with the authority and consent of the defendant. Writ dated February 13, 1909.

In the Superior Court the case was tried before *Hardy*, J. Such of the facts as are material to an understanding of the decision are stated in the opinion. At the close of the evidence the defendant asked the presiding judge to rule that there was not sufficient evidence to warrant a verdict for the plaintiff. The ruling was refused. The jury found for the plaintiff in the sum of \$1,891.67; and the defendant alleged exceptions,

F. N. Wier, for the defendant.

S. A. Fuller, for the plaintiff.

RUGG, J. This is an action of tort to recover damages for the conscious suffering and death of a foreman of a section gang in the employ of the defendant. The plaintiff's intestate was working in a railroad yard, where there were frequent shiftings of cars and passing of locomotives, and he was repairing a track called "thirteen," adjoining and branching from which was another called "fifteen." There was evidence tending to show that one Currier, who was the conductor of a shifting crew in this yard, asked the plaintiff's intestate if he could set "two cars in" on track "thirteen," and he was answered, "Yes, you can, but you can't bother me any more until I have this job done."

Currier replied, "All right," and soon after put two cars on that track. About half an hour later by Currier's direction a car was shunted on to track "fifteen" which struck the plaintiff's intestate as he was stooping at his work on track "thirteen," very near its junction with track "fifteen" and where the two tracks were ten to eighteen inches apart.

It is plain that if there had been no talk between Currier and her intestate the plaintiff could not recover. It was said in Morris v. Boston & Maine Railroad, 184 Mass. 368, 371, "By the nature of his employment a section hand on a steam railroad must look out for passing trains, and such is the settled law of the Commonwealth." The same rule applies in a freight yard where the danger arises from single cars, locomotives or parts of trains. Byrnes v. New York, New Haven, & Hartford Railroad, 195 Mass. 437. Dolphin v. New York, New Haven, & Hartford Railroad, 182 Mass. 509. Lynch v. Boston & Albany Railroad, 159 Mass. 536.

The conversation with Currier was susceptible of the interpretation that he, being in charge of the shifting, agreed with the plaintiff's intestate that no cars after the two specifically mentioned would be sent down upon any track in such a way as to interfere with the work the latter was doing on track "thirteen." If this was found to be the fair import of the language used, then the intestate while so engaged and relying upon this assurance was relieved of the duty of watchfulness as to cars coming from Currier's engine. Edgar v. New York, New Haven, & Hartford Railroad, 188 Mass. 420. Santore v. New York Central & Hudson River Railroad, 208 Mass. 437. Welch v. New York, New Haven, & Hartford Railroad, 182 Mass. 84.

Exceptions overruled.

FRANCIS C. WELCH & others, executors & trustees, vs.

HAROLD BLANCHARD & others.

Suffolk. January 20, 1911. - April 7, 1911.

Present: Knowlton, C. J., Morton, Loring, Brally, & Rugg, JJ.

Devise and Legacy, To "heirs." Trust, Construction. Words, "Heirs at law."

- A bequest or devise to "heirs" or "heirs at law" of the testator will be construed as having been used accurately and to mean those who take the testator's real estate at the time of his death unless a different intent is plainly manifested by the will.
- A testator by the first three clauses of his will gave legacies to various servants, a bequest of money to an academy for a library, and bequests to two unmarried daughters equal to sums given to other daughters upon their respective marriages; by a fourth clause he established three trust funds, two for the benefit of servants during their respective lives and one to furnish an income for the purpose of enabling the unmarried daughters to keep the homestead in good condition, the clause ending with the words, "The principal sums or funds shall, as the trusts cease, be distributed to my heirs." A fifth clause gave to his son the land within the fence of the homestead. A sixth and a seventh clause gave the residue of the testator's real estate and the personal property pertaining to the homestead to his unmarried daughters for their lives and the life of the survivor so long as they or she should continue unmarried, and, "after the marriage or death of " such survivor "the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." An eighth clause gave to the son one sixth of the residue of the personal estate and to trustees the other five sixths in trust to pay the income to all of the testator's daughters in equal shares and to the issue of any deceased daughter. such issue taking the mother's share, and "after the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs." In a suit after the death of the survivor of the daughters by the trustees under the eighth clause, for instructions as to the disposition of the fund, it was held, that the word "heirs" in the eighth clause meant real "heirs," and not such persons as would have been heirs had the testator died at the time of the termination of the trust, and therefore that the fund should be distributed among those persons then entitled as heirs of the testator or as succeeding to rights of heirs either as their next of kin or by bequest or assignment.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 10, 1910, by the trustees under the will of John Dove, late of Andover, for instructions.

The case was heard by *Braley*, J., upon the bill, answers and certain facts agreed upon by counsel. The single justice ruled that, under the eighth clause of the will, which is described in

the opinion, the testator's heirs were to be ascertained as of the date of his death and not as of the date of the death of his last surviving daughter, ordered a decree to be entered that the fund was to be distributed accordingly, and at the request of certain of the defendants reported the case with the stipulation that, if the ruling was correct, a decree was to be entered accordingly; otherwise, such decree was to be entered as the full court might determine.

J. L. Thorndike, for John A. Blanchard and others.

H. Wheeler, for Marion Dove Lee and others.

LORING, J. By the eighth article of his will John Dove gave one sixth of the residue of his estate to his son outright and five sixths thereof to trustees to pay the income thereof to all his daughters, in equal shares, and to the issue of any deceased daughter (such issue taking their mother's share); and "after the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs." John Dove died in 1876, and the last surviving daughter died in 1910. The question we have to decide is whether by the true construction of these words this fund is to be distributed to and among those persons who are entitled thereto in 1910 as the heirs of John Dove who died in 1876 (including persons who have succeeded to the rights of his heirs as next of kin or by bequest or assignment) on the one hand, or on the other hand to and among those persons who would have been the heirs of John Dove if he had died in 1910 in place of 1876.

A man's heirs are not ascertained until he dies, and using words with accuracy a man's heirs cannot be ascertained at any other time or as of any other time. But a testator may make a gift to persons who would have been his heirs had he died at some time other than the time when he did die (see for example *Peck* v. *Carlton*, 154 Mass. 231). This is not (using words with accuracy) a gift to heirs but to a body of artificial or hypothetical heirs (see *In re Wilson*, [1907] 2 Ch. 572, 575), that is, to persons who would have been his heirs had he died under circumstances different from those under which he did die.

The rule of construction in cases like that now before us was settled as early as Abbott v. Bradstreet, 8 Allen, 587, and it is

this: "A bequest or devise to 'heirs' or 'heirs at law' of a testator, will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will." See p. 589. This rule has since been adhered to. The last case is Jewett v. Jewett, 200 Mass. 310. It was said in Whall v. Converse, 146 Mass. 345, 348, that: "The reasons for this rule are, that the words [heirs of the testator] cannot be used properly to designate anybody else [than those who take his real estate at his death]"; that the testator wishes the law to take its course; "and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment."

We do not spend time on a discussion of what the construction of these words in the eighth article of this will would have been if they had stood alone. For they do not stand alone, and the general scheme of the will shows that the intention of the testator was that on the death of the last surviving daughter this fund should be distributed to and among those entitled to it then as the real heirs of the testator including those who had succeeded to the rights of his heirs as their next of kin or by bequest or assignment from them.

The testator was a widower with one son and five daughters, possessed of a very considerable property, about \$90,000 of which was in real estate including his homestead. It does not directly appear that he had any land in addition to the homestead except that within the fence around his son's house which he devised to his son.

He first gave legacies amounting to \$3,000 to several persons who may be assumed to have been servants, a bequest of \$10,000 for a library at Phillips Academy in Andover, and to his two unmarried daughters bequests equal in amount to the sums given by him on their marriage to his other daughters. These sums amounted to some \$28,000. Then, by the fourth article of the will, he gave to trustees \$2,000 to pay the income thereof to one Mary McLagan during her life, \$5,000 to pay the income thereof to one Coulie during his life, and \$50,000 to pay the income thereof to his unmarried daughters and the survivor of them so long as they or she remained unmarried and occupied the homestead, "for the purpose of enabling them to keep said

homestead in good order and condition." This (the fourth article) ends with these words: "The principal sums or funds shall, as the trusts cease, be distributed to my heirs." By the fifth article he gave to his son the land within the fence of his homestead, and by the sixth article he devised to his unmarried daughters the residue of his real estate for their lives and the life of the survivor so long as they or she should continue unmarried. He then provided that "after the marriage or death of my surviving daughter taking under this item the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." By the seventh article he gave the personal property pertaining to the homestead to his daughters, to be held by them upon the same terms as the real estate covered by the sixth article, and by the eighth article (the article here in question) he bequeathed to his son (in the event which happened) one sixth of the residue of his personal estate, and to trustees the other five sixths thereof in trust (as we have said) to pay the income thereof to all his daughters in equal shares and to the issue of any deceased daughter (such issue taking their mother's share); and "after the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs."

Apart from the provisions for servants, for the library, and his son, the scheme of the will was to create life estates in five different funds and as the life estate or the last life estate in each fund came to an end the principal of that fund was to pass to or be distributed among his heirs. These several life estates of necessity would terminate at three different times and might terminate at four or possibly five different times. Consequently the five different funds would pass under the gifts over at three, four or possibly five different dates. It is hardly conceivable that the testator should have intended that these several gifts over to heirs should be to three, four or possibly five sets of different hypothetical heirs. On the contrary it is plain that all that the testator wished to do was to provide for certain persons by creating life estates in the five different funds, and having done that to let the law take its course in each instance.

Again, it is hard to believe that the testator intended the gift

over made by the eighth article to be a gift to artificial or hypothetical heirs, while the gifts over made in the fourth and sixth articles were to his real heirs. It was decided in Dove v. Torr, 128 Mass. 88, that the gift over in the sixth article was a gift to the testator's real heirs. And it is plain that the gift over made in the fourth article is the same, that is, to his real heirs. That gift plainly comes within the rule established in Abbott v. Bradstreet, 3 Allen, 587, and since acted upon, the last case being Jewett v. Jewett, 200 Mass. 810. The fact that a gift over is made only by a direction to distribute does not prevent the application of the usual rule. The gift over in the following cases was only by way of a direction to pay or distribute: Minot v. Tappan, 122 Mass. 535; Dove v. Torr, 128 Mass. 38; Whall v. Converse, 146 Mass. 345; Rotch v. Rotch, 173 Mass. 125; Jewett v. Jewett, 200 Mass. 810. See also 2 Wms. Ex. (9th ed.) 1108; 1 Wms. Ex. (10th ed.) 990, 991; 2 Jarm. Wills, (6th ed.) 1104.

It has been urged with great insistence by the learned counsel for the appellant that it could not have been the testator's intention that when the time for distribution came any one should take who was not a blood relation or a statutory heir, and that under the construction adopted by the single justice the assignees of an heir would and in this case do take. But it is evident that it was no part of the intention of the testator in making this will to guard his heirs against their own improvidence. He did not provide as he might have done that what they took under his will should not be alienated by them or taken by their creditors. He was content to create certain life estates and then to let the law take its course, which included the right of his children to assign or bequeath their respective shares of his property subject to the several life estates created by him.

We are therefore of opinion that by the true construction of the eighth article of the will here in question the principal of the trust fund there created should be distributed to and among those persons now entitled to it as the heirs of the testator, including persons who have succeeded to the rights of his heirs as next of kin or by bequest or assignment.

Decree accordingly.

MARY A. O'BRIEN vs. JOHN H. SHEA.

Suffolk. November 11, 1910. — May 16, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

- Contract, Implied in fact, Implied by law, Validity. Landlord and Tenant. Lord's Day. Practice, Civil, Conduct of trial, Exceptions, Duty as to ruling in absence of request.
- At the trial of an action to recover rent for the occupation by the defendant of a cottage belonging to the plaintiff, if it appears that an oral agreement to hire the cottage was made on a Sunday, which it is assumed would be void under R. L. c. 98, § 2, St. 1904, c. 460, § 2, and that afterwards the defendant occupied the cottage with the consent of the plaintiff as if holding under him, the presiding judge properly may refuse to rule that the plaintiff cannot recover; because upon the evidence presented it may be inferred from the conduct of the parties on subsequent week days that they made a valid agreement adopting the terms of the agreement of Sunday, which would make the defendant liable for the rent stipulated for on Sunday, or it may be that, in the absence of an express lawful agreement as to the amount of rent to be paid, the plaintiff would be entitled to recover the fair value of the defendant's use and occupation of the plaintiff's cottage.
- In an action to recover rent for the occupation by the defendant of a cottage belonging to the plaintiff, which is subject to a mortgage, if there is evidence warranting a finding that the defendant made a lawful agreement to hire the cottage from the plaintiff, it is not necessarily a defense to the action to show that the plaintiff intended to treat the defendant as occupying under the mortgages and to hold the mortgages accountable for the rent, and that the action against the defendant was begun only after an unsuccessful attempt to hold the mortgages liable, because the relations between the plaintiff and the mortgages, although important, are only material in determining whether the defendant hired the cottage from the plaintiff.
- At the trial of an action of contract to recover rent for the occupation of a cottage belonging to the plaintiff, which is subject to a mortgage, the presiding judge properly may refuse to give an instruction singling out certain evidence favorable to the defendant as tending to show that the plaintiff intended to hold the mortgagee for the rent, where this is only one of the circumstances to be weighed by the jury in determining whether the defendant hired the cottage from the plaintiff.
- A presiding judge properly may refuse to rule upon certain uncontroverted facts picked out from the evidence when the disputed facts also are material.
- Where an action at law is before this court upon a bill of exceptions, only the questions raised by the exceptions can be considered. In the present case the question sought to be raised before this court was not brought to the attention of the presiding judge at the trial, was not raised or referred to by counsel at the trial and was not open on the pleadings.
- It is at least doubtful whether this court have power under R. L. c. 156, § 3, where an action at law is before them upon a bill of exceptions, to order a new trial on

account of an error of law made by the judge who presided at the trial which is not brought in question by any of the exceptions. By Sheldon, J.

At the trial of an action of contract, if the evidence discloses the fact that the agreement relied upon by the plaintiff was made on a Sunday, contrary to the prohibition contained in R. L. c. 98, § 2, St. 1904, c. 460, § 2, but this defense does not appear from the allegations of the declaration and is not set up in the answer and the defendant in no way raises the question at the trial, although it seems that the presiding judge, if he sees fit to do so, may of his own motion rule upon the question in favor of the defendant, and that such ruling would be sustained, yet it is not the absolute duty of the judge to interfere by proposing and sustaining this defense which has not been set up by the defendant, and his failure to do so gives the defendant no ground for exception.

CONTRACT to recover \$100 for the rent of a cottage and \$50 for the rent of a stable upon property in the town of Sharon standing in the name of the plaintiff, subject to a mortgage, and occupied by the defendant during the summer season of 1904. Writ in the Municipal Court of the City of Boston dated October 17, 1908.

The declaration contained three counts, the first alleging that the defendant owed the plaintiff \$150 for the use and occupation of a certain cottage and stable hired from the plaintiff by the defendant, the second on an account annexed for the same amount, and alleged to be for the same cause of action, the third alleging that the plaintiff made a demand upon the defendant for the payment to her of the money due as set forth in the first and second counts on or about January 1, 1905, and that the defendant owed her interest on \$150 from that date.

The answer contained a general denial and an allegation of payment.

On appeal to the Superior Court the case was tried before Fox, J. At the trial the plaintiff waived any claim for the rent of the stable. The defendant admitted the occupation of the cottage, but asserted that he occupied it by virtue of an arrangement with one McNeil, who was at that time the mortgagee of the premises in question, and that he had no agreement of any kind with the plaintiff in regard to such occupation.

The plaintiff testified that McNeil had a mortgage upon the premises on which the cottage with several other similar cottages was situated during the year 1904 and 1905. In regard to the alleged hiring of the cottage by the defendant she testified substantially as follows: "I didn't speak with Mr. Shea; I spoke VOL. 208.

with his wife. He was sitting there and heard the conversation. Mrs. Shea told me that she was looking for a cottage and that she had come down to Sharon on account of her health. asked me how many cottages we had to rent. I told her we had two to rent. She asked me if we would let the corner cottage. I said, 'I can't let the corner cottage. I allow my daughter to occupy that in the summer time.' They then went across the street with my husband and daughter. She asked me what I got for the cottage. I told her I got \$100 a season. They went across the street with my husband and daughter and in two of the cottages they looked in the windows and went around to the corner cottage and got in through the window. Mr. McNeil and Mr. Shea had got in through the window and Mrs. Shea stayed with my daughter on the piazza. Mrs. Shea came back and said, 'We have decided to take the corner cottage.' I said, 'You can't; I have given it to my daughter.' She put her hand on my daughter's shoulder and says: 'Well, yours for mine or none at all.' Mr. Shea was not there at the time. He was coming across the street. There was nothing further said. That was the last conversation that she had at that time. When I last talked with Mrs. Shea, Mr. McNeil and Mr. Shea were just coming across the street. I guess the street is about forty feet wide. It is a wide street; a public street, and the main street. On the Wednesday following they came out. Before they left on Sunday I said to Mrs. Shea, 'Mary says you may have the cottage.'. Mr. Shea was present at the cottage; I don't know whether she heard it." The plaintiff also testified that her husband was not her agent for her Sharon property, including the cottage in question.

The plaintiff's testimony in regard to the alleged hiring was corroborated by that of her daughter. The plaintiff's husband also was a witness. Among other things he testified that he was not his wife's agent for her Sharon property, including the property in question, and that he did not agree with McNeil that the defendant might occupy the cottage free of rent.

The defendant testified in his own behalf, and McNeil also testified as a witness for the defendant.

The bill of exceptions contained the following statement: "The testimony was uncontradicted that whatever arrangement,

if any, was made for the hiring, use, occupation or tenancy of said cottage by the defendant was made on Sunday afternoon. But the attention of the court was not called to this at any time during the trial."

At the close of the evidence the defendant asked the judge to give the jury, among others, the following instructions:

- "1. Upon all the evidence the plaintiff is not entitled to recover.
- "2. If the jury find that the plaintiff's husband as her agent had general charge of the property in question, and permitted the defendant to occupy it without rent, the defendant is not liable.
- "8. If the jury find that the plaintiff's husband as her agent had general charge of the property in question and permitted McNeil to arrange for the occupancy of the same by the defendant, holding and intending to hold said McNeil for any sum that might be due for the occupancy of the premises in question, the plaintiff is not entitled to recover.
- "4. If the plaintiff or her husband as her agent intended to hold McNeil accountable as mortgagee in possession or otherwise for the rent of the property in question during its occupancy by the defendant, the plaintiff is not entitled to recover."
- "7. If the jury find that no bill was ever rendered the defendant and the plaintiff's husband as her agent attempted to recover the amount in question in a suit against McNeil begun in August, 1905, and that the present action was not begun until over three years after the defendant left the premises, they may consider these circumstances upon the question of whether the plaintiff intended to hold McNeil or the defendant for the rent in question.
- "8. If the jury find that the plaintiff intended to hold McNeil for the rent in question she cannot recover in this action."

The judge gave the second of the instructions requested as above, and refused to give any of the others.

The judge submitted to the jury the following question: "Did the defendant occupy the plaintiff's cottage under an express agreement with her for the payment of rent?" To this question the jury answered "Yes."

The jury returned a verdict for the plaintiff in the sum of



\$100 with interest from the date of the writ. The defendant alleged exceptions. The bill of exceptions contained the following statement: "The question of the illegality of the hiring in question was not raised at the trial except as it is involved in the defendant's first request."

The provision of R. L. c. 156, § 8, referred to in the opinion is as follows: "The Supreme Judicial Court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; . . ."

I. R. Clark & G. F. Ordway, for the defendant, submitted a brief.

J. A. McGeough, for the plaintiff.

SHELDON, J. There was no error in the judge's refusal to rule absolutely that the plaintiff was not entitled to recover. The defendant's argument as to this rests entirely upon his contention that according to the uncontradicted evidence the contract of hire between the parties was made on Sunday and so could not support an action. R. L. c. 98, § 2. St. 1904, c. 460, § 2. Day v. McAllister, 15 Gray, 433. Stewart v. Thayer, 168 Mass. 519. Horn v. Dorchester Mutual Fire Ins. Co. 199 Mass. 584. But, even if this position were open to him, the instruction requested could not have been given; for although the defendant might have entered upon his occupation of the plaintiff's premises under a void agreement, yet by reason of his subsequent occupation under the right of the plaintiff he could have been held liable to her, not on the ground that the void agreement had been ratified so as to be in effect from the beginning, but because it could be found from the conduct of the parties that they had subsequently without formality adopted its provisions. Miles v. Janvrin, 200 Mass. 514. Shepley v. Henry Siegel Co. 203 Mass. 48. We need not consider whether in that case the plaintiff could recover the sum stipulated for on Sunday, or whether her recovery could be only for the fair value of the defendant's occupation; Cranson v. Goss, 107 Mass. 489, 441, 442; for this point was not taken at the trial, no question of pleading was raised, and the only exceptions were to the refusal to give the defendant's first, third, fourth, seventh and eighth requests.

The other requests were rightly refused. If there was such an agreement between the parties as the plaintiff contended, the relations between the plaintiff and the mortgagee became immaterial. Those relations were no doubt important for the jury to consider in determining what if any agreement or understanding had been reached between the plaintiff and the defendant; but her intention as to what claim she would make on the mortgagee was not necessarily decisive of the issue in this case. The refusal to give the third, fourth and eighth requests was right.

Nor was it wrong to refuse to give the seventh request. The defendant could not require the judge to single out the circumstances favorable to the defense and instruct the jury to consider these. It might have seemed to the jury to make the intention of the plaintiff as to the mortgagee the controlling feature of the case, whereas it was really only one of the circumstances to be weighed. Green v. Boston & Lowell Railroad, 128 Mass. 221, 227. Delaney v. Hall, 130 Mass. 524. Bugbee v. Kendricken, 182 Mass. 849. Murphy v. Boston & Albany Railroad, 133 Mass. 121, 126. Hopcraft v. Kittredge, 162 Mass. 1, 11. Lakeside Manuf. Co. v. Worcester, 186 Mass. 552, 558, 559. As in the case last cited, this instruction might have confused and misled the jury. Nor was the judge required to pick out uncontroverted facts and rule upon them, for the disputed facts were material. Pierce v. O'Brien, 189 Mass. 58, 61.

The defendant complains that the verdict for the plaintiff rested only upon the finding that he occupied her cottage under an express agreement with her for the payment of rent, and that on the evidence this agreement was made on Sunday, and so that the verdict cannot be sustained. But this point was not brought to the attention of the judge at the trial or taken in any way in the Superior Court. The whole case is not before us. We can deal only with the exceptions that were saved and allowed, and can consider only the questions raised by these. R. L. c. 173, § 117. Littlefield v. Gilman, 207 Mass. 539. Bond v. Bond, 7 Allen, 1, 6, referred to in Webb v. Hanley, 206 Mass. 299, 305. McRae v. Locke, 114 Mass. 96, 97. Rich v. Lancaster Railroad, 114 Mass. 514. Jarvis v. Mitchell, 99 Mass. 530, 532. Commonwealth v. Althause, 207 Mass. 82, 45.



Such cases as Parrott v. Mexican Central Railway, 207 Mass. 184, 190, and Vermilye v. Western Union Telegraph Co. 207 Mass. 401, do not help the defendant; for this point was not only not referred to by counsel or raised at the trial, but it was not open on the pleadings. A different rule may be applied in equity where the whole case comes before this court on appeal, especially when the illegality amounts to a very high crime, as in Dunham v. Presby, 120 Mass. 285. No contention can be made in this court upon a point which was not taken in the Superior Court. Colvin v. Peabody, 155 Mass. 104. Barker v. Lawrence Manuf. Co. 176 Mass. 203. Henderson v. Raymond Syndicate, 188 Mass. 443, 446. Howard v. Fall River Iron Works, 208 Mass. 278, 277. We cannot set aside the verdict on this ground.

But it is said that the plaintiff was allowed to go to the jury upon her allegation that an express contract had been made between her and the defendant, although it then appeared that the contract was made on Sunday, and so was illegal and void. The contention is that no court will consciously lend its aid to the enforcement of an illegal contract. Classin v. United States Credit System Co. 165 Mass. 501, 508, and cases cited. It is said that for this reason, although that defense was not pleaded and the point was in no way called to his attention, the judge at the trial ought of his own motion to have interfered and to have ruled that the action could not be maintained upon the express contract, and that this court ought now, although having before it only specific exceptions which, as we have seen, do not raise this point, to order a new trial in order that the error of the judge of the Superior Court may be corrected. It is at least doubtful whether this court has the power to take such action under the provisions of R. L. c. 156, § 8. Commonwealth v. Scott, 128 Mass. 418, 420. But we need not determine that question; for in our opinion the judge at the trial was not bound to make the ruling contended for.

The illegality in this case was the violation of the statute already referred to which forbids the doing of any work or business on Sunday. This is a valid police regulation (Commonwealth v. Has, 122 Mass. 40), and if the defense is properly pleaded, is a complete bar to the enforcement of any ordinary

contract made on that day. And it may be assumed that the judge at the trial might of his own motion have ruled upon the question in favor of the defendant, if he had seen fit to do so, and that an exception of the plaintiff then would have been overruled. But the defendant, not having raised the question, could not require this to be done. As was said by Gray, C. J., in Cardoze v. Swift, 113 Mass. 250, 252, the defendant had no right to offer evidence of such illegality, "or even to avail himself of it when disclosed in the plaintiff's testimony, if the court ... [did] ... not refuse to entertain the case." Granger v. Ilsley, 2 Gray, 521. Bradford v. Tinkham, 6 Grav, 494. Goss v. Austin, 11 Allen, 525. Geer v. Putnam, 10 Mass. 312, explained in Robeson v. French, 12 Met. 24. Pratt v. Langdon, 97 Mass. 97. Cassidy v. Farrell, 109 Mass. 897. Suit v. Woodhall, 116 Mass. 547. Goddard v. Rawson, 180 Mass. 97. Doherty v. Ayer, 197 Mass. 241, 248. Many other cases might be cited to the same effect if there were occasion to do so. See for example those collected in 37 Cyc. 571, 572. But the very fact that the defendant in a case like this has no right to prove the illegality and have it considered unless he has pleaded it goes far to show that there is no imperative obligation upon the judge to interfere and refuse to entertain the action by reason of the illegality. Were it otherwise, a defendant always would be allowed to raise the question, regardless of the state of the pleadings; every plaintiff would understand that it was for him to prove the legality of his contract, as indeed has been held in a few scattering cases, and would be prepared to do so. Certainly the judge would not wilfully shut his eyes, and refuse to allow them to be opened, so as to plead ignorance of the illegality which he was sanctioning.

It is believed that in actions at law like the one at bar, in which the defense of illegality has not been set up, the court will recognize no absolute duty to interfere and of its own mere motion to sustain a defense not set up by the party, and generally will not so interfere, unless, first, the plaintiff's declaration shows that he relies upon an illegal agreement or violation of law, or, secondly, unless he has been obliged to show his own guilt in fully proving his case. Under the first of these heads come such cases as Classian v. United States Credit System Co. 165 Mass. 501; Hazelton v. Sheckells, 202 U. S. 71; and Isler v. Brunson,

6 Humph. 277. In the second class are included such cases as Oscanyan v. Arms Co. 108 U. S. 261; Thomas v. Richmond, 12 Wall. 349; Fowler v. Scully, 72 Penn. St. 456; and Alford v. Burke, 21 Ga. 46.

In many of the cases which have been relied on in behalf of the defendant, the point was raised in the pleadings, either by averments in the answer, by agreed statements of facts, or otherwise. See for example Libby v. Downey, 5 Allen, 299; Smith v. Arnold, 106 Mass. 269; Palmer v. Kelleher, 111 Mass. 220; Eaton v. Kegan, 114 Mass. 433; Prescott v. Battersby, 119 Mass. 285; Snell v. Dwight, 120 Mass. 9; Baldwin v. Connecticut Mutual Ins. Co. 182 Mass. 389; Kennedy v. Welch, 196 Mass. 592. In Horn v. Dorchester Mutual Fire Ins. Co. 199 Mass. 534, the plaintiff was allowed to rely on the illegality of the surrender set up by the defendant. As the parties were at issue on the answer, the case stood as if the plaintiff had set up the defense by replication. R. L. c. 173, § 81.

There are some decisions and some statements in the books at variance with our conclusion. Heffron v. Daly, 188 Mich. 613. Richardson v. Buhl, 77 Mich. 632. Pietsch v. Pietsch, 245 Ill. 454. Escambia Land & Manuf. Co. v. Ferry Pass Inspectors & Shippers Association, 59 Fla. 289. See also the cases collected in 15 Am. & Eng. Encyc. of Law, (2d ed.) 1015, not all of which however uphold the statement of the text. But we feel that the result which we have reached is supported both by principle and by authority.

Exceptions overruled.

HEMAN M. BURR vs. CITY OF BOSTON.

Suffolk. November 17, 1910. — May 16, 1911.

Present: Knowlton, C. J., Morton, Hammond, Loring, Braley, Sheldon, & Rugg, JJ.

Tax, Exemption. Charity.

Real estate in a city, which is held by that city in trust to apply the income thereof to the maintenance and improvement of its common and parks, is held upon a valid public charitable trust and for that reason is not subject to taxation.

Whether a city or town can tax real estate owned by itself, unless by assessment under such a specific provision as that contained in St. 1909, c. 490, Part II. § 67, in regard to land taken or purchased for non-payment of previous taxes, here was referred to as a question which was not passed upon.

Contract for \$470.25 paid by the plaintiff under protest on February 9, 1910, as a tax assessed upon the land with the building thereon numbered 31 on Chestnut Street in Boston, which was sold and conveyed to the plaintiff by the defendant on February 4, 1910, and was alleged by the defendant to be subject to an assessment for such taxes made on May 1, 1909, when the property was held by the defendant under a devise contained in a codicil to the will of George F. Parkman, late of Boston, which gave the residue of the estate of the testator to the defendant to constitute a fund, the income of which was to be applied to the maintenance and improvement of the Common and parks of the defendant. Writ dated February 14, 1910.

The answer contained a general denial and an allegation that the tax paid as alleged by the plaintiff was legal and valid and was justly due from the plaintiff.

In the Superior Court the case was submitted upon an agreed statement of facts to *King*, J., who found for the plaintiff in the sum of \$487.94 and ordered judgment for that amount. At the request of the parties the judge reported the case upon the pleadings and the agreed facts for determination by this court.

The case was argued at the bar in November, 1910, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

R. F. Sturgis, for the plaintiff.

T. M. Babson, for the defendant.

SHELDON, J. We assume, in accordance with the contention of the defendant, that this devise to the city of Boston did not vest absolutely in the city until its acceptance thereof (Dailey v. New Haven, 60 Conn. 814), and that as the city might elect either to accept or to decline the proposed benefaction, so it might make a conditional acceptance thereof, and then would be bound only by the terms of the devise and its own conditional acceptance. But it did unconditionally accept this devise on the terms on which it was made; and the provisions of its order of acceptance, authorizing its treasurer to receive and hold the devise, were added merely to designate the officer who should receive it and have charge thereof. As all the debts and legacies had been paid or funds set apart for their payment when the order of acceptance was passed in March, 1909, it follows that the title to all the real estate covered by the devise vested at least then in the city as its property, and this included the Chestnut Street estate here spoken of. The case presents no question of equitable conversion. On the first day of May this was the property of the city, though held in trust for a public use. On that day, the board of assessors assessed a tax thereon to "the devisees of George F. Parkman"; and the question is whether the tax was valid.

It is not contended that the property was exempt from taxation under any of the provisions of R. L. c. 12, §§ 5 et seq., but the plaintiff contends that it could not be legally taxed because of the fact that the title to it was in the city itself upon the trust stated.

There is no doubt that land held by one municipal corporation within the territorial limits of another for a public or governmental use is exempt from taxation, not by reason of any specific statutory exemption, but upon what always has been assumed to be the intention of the Legislature in the statutes relating to taxation. *Milford Water Co. v. Hopkinton*, 192 Mass. 491, and cases cited. *A fortiori* this is so if the land is situated in the city which owns it. On the other hand such property while not actually put to any public use, but availed of for purposes of revenue merely, is taxable by the city or town in which it is situated. *Essex County* v. *Salem*, 153 Mass. 141. In that case the court said: "The property of counties is held exempt

from taxation when appropriated to public uses, because courts infer that it is not the intention of the Legislature to tax property so used in the absence of any express declaration that it should be taxed. This implication is made on account of the nature of the uses to which the property is appropriated. It is not to be presumed that the Legislature intended to tax the instrumentalities of government. Worcester v. Mayor & Aldermen of Worcester, 116 Mass. 193." And farther on the court added: "In the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public uses. This is the principle which underlies all our decisions in cases analogous to the present, and we see no ground on which it ought to be extended to the property of a county actually devoted to private uses which are not incidental to the performance of public duties,"

In the case at bar the property was held by the city in trust to apply the income thereof to the maintenance and improvement of its Common and parks. This is a valid public charitable trust. *Bartlett, petitioner*, 168 Mass. 509, 514. It supplies funds for a purpose which otherwise must be provided for by taxation, and so far tends to lighten the public burdens. This is strictly a public use.

We need not consider whether the city collector could maintain an action to recover this tax under R. L. c. 18, § 32. Such a suit of course must be brought against the city itself, since that alone is properly described by the language of the assessment, which can be applied to no other natural or artificial person. For such a tax the primary liability is upon the person taxed and not upon the property for which the tax is assessed; Dunham v. Lowell, 200 Mass. 468; and it might be a serious question whether the Legislature intended in any case to cast such primary liability upon the city or town to which that tax is to be paid. But as we have said, that question is not raised.

This land however was not used directly for a public purpose, as if for example it were itself made into a public park, or were used as the site of a city hall or library building. It was held in trust to apply the income to the specific public charitable purpose stated in Mr. Parkman's will. The land which was decided to

be taxable in *Essex County* v. *Salem*, *ubi supra*, was held and could be held by the county, until it should be applied to the contemplated public use and so should become exempt from taxation, strictly for the application of any income derived therefrom, like all other revenue of the county, to the general public purposes for which alone the money of the county could be spent. The case at bar differs from that case in two respects: First, that here the land sought to be taxed is within the territorial limits of the city which owns it; and secondly, that this land is held in trust to apply the income thereof to a specific public charity and not to the general public purposes of the city.

The general rule laid down by our decisions is that real estate situated in one city or town but owned and used by another for a specific public purpose is exempt from taxation, but that this exemption is limited to property which is directly appropriated to such a specific purpose. Wayland v. County Commissioners, 4 Gray, 500, in which it was held that land in Wayland owned and appropriated by the city of Boston under St. 1846, c. 167, for the sole purpose of supplying that city with water, was exempt from taxation; but it was expressly stated by the court that "if the land was valuable for and used for purposes other and distinct from those of the aqueduct, the property so used to the extent it was so used, would be liable to taxation." The same doctrine is affirmed in later cases. Worcester County v. Worcester, 116 Mass. 193. Somerville v. Waltham, 170 Mass. 160. Miller v. Fitchburg, 180 Mass. 32.

On the same principle, the real property of a public service corporation, so far as appropriated and used within authorized limitations, but no farther, is exempt from taxation. Worcester v. Western Railroad, 4 Met. 564. Many later cases are collected and both the general principle and its limitation are stated in Milford Water Co. v. Hopkinton, 192 Mass. 491. Hammond, J., said in that case: "The true test is whether it [the corporation owning the land] is engaged in the administration of a public trust with power to take land for that purpose. It is the character of the use to which the property is put, and not of the party who uses it, that settles the question of exemption from taxation."

But none of these cases, and indeed no case to which our at-

tention has been called except Lancy v. Boston, 186 Mass. 128, dealt with the exemption of land owned or appropriated for a public use by the city or town in which the land was located. It was held in that case that land in which an easement had been taken by right of eminent domain either for a highway or for railroad purposes was not taxable to the owner of the fee. The general question of the right or duty of a city to tax land owned by itself within its own limits, though not appropriated or used for a public purpose, was not considered. Nor have we found any case which considers the manifest distinction between such land held upon an express trust for a specific public charitable use to which alone its income can be applied, and land which is held merely in the general ownership of the city and of which both the corpus and the income may be applied to its general purposes.

If taxes can be lawfully assessed by cities and towns upon their own lands, then it is the duty of the assessors to lay such assessments and of the collectors to enforce the payment thereof. These officers are strictly public officers and in no sense the agents or representatives of the municipalities. Rossire v. Boston, 4 Allen, 57, 58. Dunbar v. Boston, 112 Mass. 75. Alger v. Easton, 119 Mass. 77, 78. Welch v. Emerson, 206 Mass. 129, 130. Cox v. Segee, 206 Mass. 380, 382. Gile v. Perkins, 207 Mass. 172. They are bound to discharge faithfully their duty by assessing all taxable property and by enforcing payment of all taxes duly assessed and committed to them for collection. R. L. c. 12, §§ 2, 15, 37, 51, 67; c. 18, § 2; c. 25, § 68. Boston v. Turner, 201 Mass. 190, 196. Their duty to assess and collect taxes upon all the real estate which passed to the defendant by Mr. Parkman's will, if that property is liable to taxation, is absolute, and does not at all depend, as to any particular parcel, upon whether it has or has not been conveyed by the city. But there are serious practical difficulties in such assessment and collection. Some of them already have been mentioned. The rate of taxation for city purposes is limited by statute to the amount which the Legislature has regarded as sufficient. R. L. c. 12, § 54; c. 27, § 26. The value of the real estate received under this devise was nearly a million of dollars. If this is taxable, as the tax must be paid by the city itself, its net income will so far be

diminished beyond the amount contemplated by the Legislature, or either the corpus or the income of the trust fund will so far be reduced. If the city owns other land, which is unimproved and yields no income, this will become a liability instead of an asset. But we know that this has been the case in the past, not only in Boston but in other municipalities. See Keening v. Ayling, 126 Mass. 404; Dingley v. Boston, 100 Mass. 544; Page v. O'Toole, 144 Mass. 303; Commonwealth v. Roxbury, 9 Gray, 451; Cleaveland v. Norton, 6 Cush. 880, 884; Brigham v. Shattuck, 10 Pick, 306, where there was a devise somewhat like the one before us; Hayden v. Stoughton, 5 Pick. 528, where land devised to a town for a public use was accepted and held by the town, but the condition was not complied with. Rawson v. Uxbridge School District, 7 Allen, 125, resembles Hayden v. Stoughton, the town having ceased to hold the land for the public purpose to which it had been appropriated and having afterwards sold it to the tenant to be used for a wholly different public purpose. It is believed that at least a large portion of that thickly settled part of the city of Boston now called the South End was, while vacant and unimproved, the private property of that city, as appeared in Keening v. Ayling, ubi supra. It does not appear that in any of these cases, or in any of the other cases of similar ownership, which probably have been numerous, any question was raised as to the payment of taxes upon the property while so owned; a circumstance which would tend to show the general opinion that under such circumstances there was no liability to taxation.

But we do not deem it necessary to pass upon this broad question. This estate was held by the city in trust for a specific public purpose. In this respect it resembles somewhat the sinking funds which in some cases cities are required by R. L. c. 27, §§ 12 et seq., to provide and maintain for the extinguishment of their indebtedness. Under § 15 these funds may be, and doubtless sometimes are, invested in mortgages upon real estate. It sometimes must be necessary to foreclose such mortgages and to take title to the land therein described. If the income of the fund is to be diminished and its accumulation checked and delayed by the payment of taxes upon the land while so held as an investment, the purpose of the statute to which we have referred,

to provide sufficient means for the payment of the debt at its maturity, is so far frustrated. Accordingly real estate so held has been decided to be exempt from taxation. Commonwealth v. Lebanon Water Works, 130 Ky. 61. And yet the land in such a case is not directly appropriated and used for a public purpose. Like that involved in the case at bar, it is held merely as an investment, part of a fund whose income is to be applied to a specific purpose, such as properly comes within the definition of a public charity. The income of this fund is directly applicable to such a public use; neither directly nor indirectly can the city of Boston divert it therefrom. The income must forever be applied to this specific purpose. It can in no way and by no artifice be applied to the general purposes of the city. The case in this respect differs materially from Essex County v. Salem, 153 Mass. 141, and the other cases heretofore cited, in which the actual use of the property was made the test of its liability to taxation.

Real estate held by educational, charitable or religious institutions is not exempted from taxation unless used and appropriated for their distinctive purposes. R. L. c. 12, § 5, cl. 3 and 7. Amherst College v. Amherst, 198 Mass. 168. Evangelical Baptist Society v. Boston, 204 Mass. 28. But this is by the express words of the statutes. In such cases the income of the property which was held not to be exempt went into the general funds of its owners, and a case like that now before us was not presented. And any inference that might be drawn against our conclusion from the language of this statutory exemption is largely met by the fact that upon the reasoning in Davis v. Treasurer & Receiver General, ante, 843, Mr. Parkman's devise would be exempt from the succession tax imposed by St. 1909, c. 490, Part IV., and c. 527. This circumstance is of course not decisive; but it is to be considered in determining what is a just and consistent mode of taxation under our statutes and decisions.

The specific provision in St. 1909, c. 490, Part II. § 67, for taxation by a city or town of land taken or purchased by it for non-payment of prior taxes, unless wholly superfluous, tends to indicate the legislative opinion that such land would not otherwise be taxable.

It is said however that in fixing the basis of State and county

taxation an injustice will be done by taxing disproportionately other cities and towns if property like this is not to be assessed. We do not know what property is held by other municipalities that would be exempt under our view. It may be that some slight inequality would result, but looking at the total assessed valuation of the Commonwealth, we cannot regard this as more than a negligible quantity. See Natick & Cochituate Street Railway v. Wellesley, 207 Mass. 514, 528, 524.

We are of opinion that this estate, owned by the defendant not for its own benefit but strictly in trust to apply the income to a particular specified charitable use, is not legally liable to assessment and taxation. The judgment for the plaintiff must be affirmed.

So ordered.

Moses Williams & others, trustees, vs. Laurence H. H. Johnson, trustee, & others.

Suffolk. January 17, 1911. — May 16, 1911.

Present: Knowlton, C. J., Morton, Hammond, Lobing, Brally, Sheldon, & Rugg, JJ.

Corporation, Ukra vires. Railroad.

When a railroad corporation finds itself the owner of a large tract of valuable land in the heart of a city, which no longer is available for railroad purposes, it is the duty of such corporation to dispose of the land and turn it into money, and the corporation lawfully may exercise such powers as are incidental to its ownership and right to sell, but nothing more is permissible than what is fairly incidental to a disposition of the property for its fair market value within a reasonable time.

A railroad corporation, subject to the laws of this Commonwealth and operating a railroad therein, which was the owner of a large tract of land in the heart of a city of the estimated value of \$5,000,000 that no longer was available for railroad purposes, made a deed of conveyance of such tract of land to certain trustees accompanied by a declaration of trust, by which the property was put into the hands of the trustees as managing agents, who were appointed irrevocably, to conduct a business relating to the improvement, sale and management of real estate for a term that might last nearly a century, with practically the powers of an absolute owner not only over the property conveyed but for the acquisition and management of other real estate in the vicinity and of shares in corporations relating to the use, management and improvement of real estate. The scheme set forth in the declaration of trust contemplated the borrowing of money



to create an indebtedness not exceeding \$4,000,000 at any one time. The rail-road corporation was to receive from the trustees in payment for the conveyance transferable certificates representing fifty-two thousand shares of the beneficial interest of the property held in trust of the par value of \$100 each. The trustees were authorized to issue not exceeding forty thousand additional shares of the same nominal value in exchange for convertible notes or bonds that the trustees might issue to obtain money to be used in conducting the enterprise, and the declaration of trust contemplated an unlimited extension and enlargement of the enterprise, in the discretion of the trustees, by the issuing of additional shares to persons who should subscribe for them. Held, that the deed of the railroad corporation was beyond the power of the corporation to make and that the trustees took no valid title under it.

Knowlton, C. J. This is an appeal from a decree of the Land Court granting a petition for the registration of the title to a tract of land in Boston, a part of which was formerly occupied as the station of the Boston and Providence Railroad Company, at Park Square. The diversion and extension of the railroad and the erection of the terminal passenger station in Boston under the St. 1896, c. 516, rendered the property no longer available for railroad purposes, and it was conveyed by this corporation to the New York, New Haven, and Hartford Railroad Company * in consideration of improvements made by the grantee upon the property of the grantor, in connection with the location and erection of the new station. The validity of this conveyance was confirmed in Little v. Old Colony Railroad, 202 Mass. 277. The petitioners claim title under a deed from the New York, New Haven, and Hartford Railroad Company, bearing date September 15, 1909. The respondents, who are stockholders in the last mentioned corporation, deny the validity of the deed, on the ground that it was ultra vires of the corporation and that the directors had no authority to make it.

The deed runs to the petitioners as trustees under a declaration of trust. The consideration expressed in it is \$1 and other valuable considerations. The conveyance is "subject to and upon the terms, provisions and trusts mentioned and set forth in the aforesaid declaration of trust." This declaration is of a peculiar kind. It provides that the trustees shall forthwith issue to the grantor certificates, in a form prescribed, for fifty-

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^{*} A railroad corporation, subject to the laws of this Commonwealth and operating a railroad therein. See Attorney General v. New York, New Haven, & Hartford Railroad, 198 Mass. 413.

two thousand shares, of a nominal par value of \$100 each, in payment for this real estate. The entire interest of the cestuis que trust, or shareholders in the property, was to be represented, immediately after the conveyance, by these shares. The trustees were authorized to issue not exceeding forty thousand additional shares of the same nominal par value, in exchange for convertible notes or bonds that the trustees may issue to obtain money to be used in conducting the enterprise. The shares are transferable on the books of the trustees. The shareholders are not to have any legal title to the trust property itself, real or personal, and especially they are not to have a right to call for any partition. It is declared that they shall have no equitable estate in the lands and appurtenances constituting the trust property, but their interest shall consist only of an interest in the money to arise from the sale or other disposition thereof by the trustees, and, previously to such sale, in all the rights mentioned in the declaration, which are rights "of division of proceeds and profits and the other rights and matters concerning the trust property."

The death of a shareholder is not to determine the trust, nor entitle his legal representatives to an accounting, but his rights are to pass to his executors, administrators or assigns, upon the surrender of the certificate of the shares. The trustees may from time to time invite and receive subscriptions to additional shares, for the purpose of increasing the capital of the trust, giving preference, upon such terms and conditions as they shall deem best, to existing shareholders, and to the holders of convertible notes or bonds. The trustees have no power to bind the shareholders personally for any debt, nor are the trustees to be personally liable for claims or debts against the trust, but all persons extending credit to the trustees are to look only to the property of the trust for their payment. The trustees have no pecuniary interest in the property of the trust, or in the business carried on under the trust, except for the payment of prescribed commissions upon receipts and expenditures, as compensation for their services.

The trustees are to have absolute control over and disposal of all real estate and other property held under the trust, including the power to improve it by building thereon or otherwise; to sell, for cash or credit, at public or private sale, any part of



the property; "to lease or hire for improvement or otherwise, for a term beyond the possible termination of this trust, or for any less term, to let, to exchange, to release and to partition." They have power to borrow money to carry out the purposes of the trust, to issue notes or bonds, and to secure the repayment of them by a pledge, mortgage or hypothecation of the property of the trust, or any part of it. The only limitation upon the power to borrow is that the total indebtedness at any one time shall not exceed \$4,000,000. Notes or bonds issued for such indebtedness may be made convertible into shares of the trust.

The trustees may acquire, by purchase or otherwise, any real estate or any interest therein in the vicinity of that conveyed by the deed in question, "and any notes, bonds, shares or other securities of any corporation, association or real estate trust, organized or adapted for the purpose of acquiring, holding, managing or improving real estate, or for the purpose of conducting a lighting, heating, power or other business directly related to the management of real estate, if in their judgment such acquisition will in any manner tend to facilitate the laying out, development, management or improvement of the real estate" conveyed to them by the deed in question. They may lay out and construct or discontinue streets or ways, upon any property at any time held by them. They may dedicate to public use, or convey to the city of Boston, with or without compensation, any part of the property, with a view to the enhancement of the value of the remaining property. For a like purpose they may contribute money or other property to the cost of any public or quasi public undertaking. In all these matters the judgment and determination of the trustees is to be final and conclusive.

They may from time to time determine what of their receipts and expenditures shall be treated as capital and what as income, and their determination shall be final. They may divide net income among the shareholders, under certain limitations, and may set aside a part of the net income as a reserve or contingent fund. Their determination of what is net income is to be conclusive. The trust is to continue until the expiration of twenty years from the death of the last survivor of nine persons named, some of whom, presumably, are quite young, unless three

fourths in value of the shareholders shall appoint an earlier time for its termination, not earlier than the second day of July, in the year 1919, by an instrument in writing duly signed and acknowledged. After the termination of the trust by its own limitation, or by such an appointment of three fourths of the shareholders, the proceeds are to be divided among the shareholders. The trustees, when vacancies occur in their number, may appoint their own successors.

By this conveyance and the accompanying declaration of trust, the New York, New Haven, and Hartford Railroad Company set on foot a scheme to put property, of an estimated value of more than \$5,000,000, into the hands of trustees as managing agents, who were appointed irrevocably, to conduct a business for a term that might last nearly a century, with practically all the powers of an absolute owner, not only over the property conveyed, but for the acquisition of other real estate in the neighborhood, and of shares in corporations which have relation to the use, management and improvement of real estate. The scheme contemplates the borrowing of money to create an indebtedness not exceeding \$4,000,000 at any one time. It contemplates an unlimited extension and enlargement of the enterprise, in the discretion of the trustees, by the issue of additional shares to persons who subscribe for them. It contemplates a real estate business, if not a speculation, that may continue a long time and become gigantic, of which the railroad corporation is now the sole owner. It needs no argument to show that, ordinarily, the proprietorship of such a business, by a railroad company as a beneficiary, is not within its corporate powers.

As was said in Davis v. Old Colony Railroad, 181 Mass. 258, 259, "A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers." In Waldo v. Chicago, St. Paul & Fond du Lac Railroad, 14 Wis. 575, 581, we find this language: "When a corporation, created for the purpose of building and



operating a railroad, goes into the business of banking, or manufacturing and selling goods, or dealing and speculating in real estate, because its corporators or board of directors think such adventures may be profitable, or if a bank should go to building and operating a railroad for like reason, it is easy to see that in each instance the corporation is attempting to transact business which, under its organic act, it has no right or power to do. And if the corporation might embark in a separate and distinct business, not contemplated by its charter, merely because it was supposed it would be profitable and increase its means and resources, there would be no safety to the public in granting any special charters, and none to individuals who might invest in the stock of the company." The following are a few among the many other cases that apply the same doctrine: Attorney General v. Great Northern Railway, 1 Dr. & Sm. 154; Case v. Kelly, 188 U. S. 21; Pacific Railroad v. Seely, 45 Mo. 212; State v. Southern Pacific Co. 52 La. Ann. 1822; Chicago v. Cameron, 120 Ill. 447; People v. Pullman's Palace Car Co. 175 Ill. 125; Slater Woolen Co. v. Lamb, 143 Mass. 420.

If the railroad company had taken its money and purchased land, and had applied it to a use like that contemplated by this scheme, no one would contend that it was acting within the law. We are left with only the question whether its ownership of this real estate justifies its creation of such an enterprise.

Its ownership of the land, which came to it legitimately, left it with the property on hand, to be sold or disposed of, so that its proceeds could be properly used for the purposes for which the corporation was created. It did not give it the right to hold the land permanently, or for an unreasonably long time, as an investment for the production of income; much less did it give it the right to carry on, for a long term of years, the business of speculating in land, or developing this and other land in the vicinity, and changing its general character, for the purpose of gain. If the corporation could not do this directly, it could not do it indirectly through the appointment of trustees or agents who should continue the business for its benefit. Attorney General v. New York, New Haven, & Hartford Railroad, 198 Mass. 413.

The objection to such a venture on the part of a corporation is twofold. On the part of the State it is that the corporation is



usurping powers which were never conferred upon it, and is engaging in a business which the Legislature has not authorized it to do, and to which there may be grave objections on grounds of public policy. The trustees are managing for this corporation, as the beneficiary, a large amount of valuable real estate in the heart of Boston, and are authorized, in the interest of the beneficiary, to make donations of land or other property for public purposes, or to convey it to the city of Boston with or without compensation, to lay out and construct or to discontinue streets, and become the owners of corporations engaged in other kinds of business relating to real estate, even in remote parts of the city. There may be grave reasons connected with the public interest why such powers should not be exercised in a city, and, incidentally, an influence possibly be exerted in behalf of a great railroad corporation. At all events, the Legislature has never seen fit to authorize their exercise. Corporations for the holding of real estate for purposes of profit have always been deemed objectionable, and the general laws of this Commonwealth do not permit the organization of such corporations.

The other objection is from the side of the stockholder in the corporation. He invests his money by subscribing for the shares of stock, with a knowledge of the purpose for which the corporation is organized, and with a view to the probable gain, and a thought of the possible loss, that may result from the transaction of the business of the corporation. He does not invest in any other kind of enterprise than that which is within the authority conferred upon the corporation. His protection requires that the company be confined strictly to the business and functions for which it was organized. It would leave him without compass or rudder in making his investment, if the managing officers, or a majority of the stockholders, could use the corporate property in a business foreign to that for which the company was established-

In turning this real estate into money, the railroad company should not be held too strictly to sales to be made at once and without expenditure for changes and improvements that would increase its marketable qualities. A reasonable latitude in that respect is fairly incidental to ownership with a right to sell. Dupee v. Boston Water Power Co. 114 Mass. 37. But nothing more than what is fairly incidental to a reasonable disposition of

the property for its fair market value, within a reasonable time, is permissible.

The only debatable question in this case is whether such a scheme as has been devised is incidental to the right to sell, and, reasonably necessary to enable the corporation to obtain the fair market value of the property. We are of opinion that it is not.

The reasons relied on by the petitioners for adopting the scheme, as given in the statement of agreed facts, are that "earnest efforts during several years were made, without success, to sell the same and convert it into cash, but the risks and uncertainties attending the development and use of so large a tract of land, without streets or other facilities for its development. were such that no purchaser was in fact found, and no purchaser seemed likely to be found, willing and able to purchase said property, except at a price so low as to indemnify him against all such risks and uncertainties and much below the estimated real value of said land." This is, in substance, that the directors have not been able to sell the land for its estimated value, and that there are risks and uncertainties attending the development and use of the land, which a purchaser would take into account in determining what price he would pay for it. The directors decided to put these risks and uncertainties upon the stockholders of the corporation, by providing for a business of developing and using this property for many years, in the belief, doubtless, that the business would be more profitable than a sale to others who would assume the risks of such a business. This is not very different from taking \$5,000,000 in money of the corporation, if that amount happened to be on hand, and if land could be bought for its fair market value, and investing the money in such an enterprise, in the expectation that the assumption of these risks and uncertainties, in buying at a price diminished on account of them, would open a large field for profit in the business of developing and using the property.

The conveyance to the trustees merely changed the form of the property. It did not bring a dollar to the treasury of the corporation. If the trust were sustained, it might or might not be possible, at some time, to sell shares at their estimated value instead of selling portions of the land. But, presumably, there will be no satisfactory market for any of these shares, unless



it is demonstrated, after a considerable time, that the business is likely to prove profitable.

In addition to the general objections already stated to such a venture on the part of a railroad corporation, there are special objections. If stock is purchased by the trustees in other corporations, this corporation will become indirectly a holder of the stock of these other companies, in direct violation of St. 1906, c. 463, Part II. § 57, which expressly forbids the directly or indirectly subscribing for, taking or holding, by a railroad corporation of the stock or bonds of any other corporation. Attorney General v. New York, New Haven, & Hartford Railroad, 198 Mass. 418. In Williams v. Boston, ante, 497, it was decided that the certificate holders in such a trust are partners within the meaning of that word in St. 1909, c. 490, Part I. § 27.

Moreover, if other stock is issued by the trustees, and other parties are brought into the enterprise, and other lands are bought, the railroad corporation will be in a community of interest in the profits and losses, and in all the activities of the business, with other owners. It will be virtually, if not technically, in partnership with them. It is familiar law that a corporation cannot enter into a partnership. Whittenton Mills v. Upton. 10 Gray, 582. Bishop v. American Preservers' Co. 157 Ill. 284. Burke v. Concord Railroad, 61 N. H. 160. Mallory v. Hanaur Oil Works, 86 Tenn. 598. Sabine Tram Co. v. Bancroft & Sons, 16 Tex. Civ. App. 170, 174. People v. North River Sugar Refining Co. 121 N. Y. 582. Most of the reasons for this rule are as applicable to the present case as to an ordinary partnership. They are strongly stated in the first and last of the cases just cited. Through the trustees, who represent the interests of new shareholders as well as those of the creator of the trust, the rights and interests of the railroad corporation are controlled in part for those who are not members of it or peculiarly interested in it.

In the decision in *Kelly* v. *Biddle*, 180 Mass. 147, cited by the petitioners, it was assumed that the arrangement, only for a temporary purpose, might have been *ultra vires* of the corporation.

It is the duty of a railroad corporation holding real estate under such circumstances as exist in this case, to dispose of it and turn it into money with all reasonable despatch, and in view of such circumstances it may take all action necessary to realize from it, so far as possible, its fair value. We do not attempt in the present case to prescribe the precise limits of the authority of a corporation for the accomplishment of this end. These must depend upon existing conditions. Some liberality should be exercised in allowing a choice of methods where the amount involved is large and the conditions complicated.

We are of opinion that the deed of the New York, New Haven, and Hartford Railroad Company to the petitioners was beyond the power of the corporation or the directors to make, and that the petitioners took no valid title under it.

Petition dismissed.

The case was argued at the bar in January, 1911, before Knowlton, C. J., Morton, Loring, Braley, & Rugg, JJ., and afterwards was submitted on briefs to all the justices.

H. Wheeler, (C. S. Rackemann with him,) for the respondents.

B. W. Warren, (C. R. Lameon with him,) for the petitioners.

COMMONWEALTH vs. GEORGE H. PRATT. SAME vs. GEORGE H. PRATT & another. SAME vs. SOMERVILLE EVENING SUN.

Middlesex. January 27, 1911. — May 17, 1911.

Present: Knowlton, C.J., Morton, Loring, Brally, & Rugg, JJ.

Libel and Slander, Privileged communications.

In this Commonwealth a newspaper article containing false and defamatory statements of fact in regard to the conduct of one who is a candidate for a public office is not privileged and its author and publisher may be convicted of criminal libel, even if they reasonably and honestly believed the charges as stated to be true and acted in good faith.

Where, at the trial of an indictment for libel in the publishing of certain defamatory statements with regard to one W, who at the time of the publication was the mayor of a certain city and was a candidate for re-election, there is evidence that in publishing the statements the defendant acted with express malice, it is proper for the trial judge to refuse to rule, that, "assuming that W... was a candidate for re-election to the office of mayor at the time alleged in the indictment, then if the jury are satisfied that the charges as alleged in the indictment were reasonable criticism and comment upon the real acts of the said W, and the consequences likely to follow from said acts, no conviction can be

had under the indictment even though such criticism and comment were severe and sarcastic and tending to ridicule the said W," because such a ruling contains no reference to the possibility of conviction on the ground of express malice.

At the trial of an indictment for the publication of a libel regarding the mayor of a city who was a candidate for re-election, if the libel which the defendant is charged with publishing contains only statements of fact of a defamatory nature and the trial judge fully and adequately instructs the jury that if the statements were true the defendant should be acquitted unless he acted with express malice, the defendant is not harmed by a refusal of the judge to instruct the jury with regard to the law of qualified privilege, because if the statements were untrue or were published with express malice they would not be fair criticism or reasonable comment as to facts, and therefore could not be privileged.

At the trial of an indictment charging the publication of a libel stating that the mayor of a city, who was a candidate for re-election at an election to be held just after December 18 of a certain year, was intoxicated on a certain occasion, there was evidence tending to show the following facts: The defendant, who was a clergyman, called at the mayor's private business office on July 8 of that year, introduced himself as a correspondent of a newspaper of a distant city and in conversation accused the mayor with being intoxicated a few days before, which was the occasion described in the alleged libellous publication. The mayor denied the accusation. Subsequently the defendant gained access to the mayor's office under an assumed name and, being ordered out said, "You can't scare me. N [the opposition candidate for mayor] will attend to you." On November 22 the defendant stated to the chief of police of the city that he "had an article about" the subject matter of the alleged libel "all written up and sealed in a safe in the hands of a printer ready to be published at a word from him." On November 26 he wrote to the chief of police that he wanted "something done" in the matter "at once." On December 8 or 9 he interviewed the chief of police and stated that he had come to give the mayor a "last chance," that he had "a lot of matter prepared," and sought to make an appointment at noon of that day to show it to the chief of police. Asked what he would do if the mayor denied the allegations, he said he should publish them. Within the first ten days of December he was interviewed by a reporter, whom he knew to be the representative of a newspaper in which the alleged libel afterwards was published, and made to him the statements which were published on December 10. Held, that there was evidence warranting a finding that the defendant legally was responsible for the libel.

THREE INDICTMENTS FOR LIBEL, found and returned on January 6, 1910.

The third indictment was against a corporation which was the proprietor of a newspaper called the Somerville Evening Sun, and charged the publication of two libels, one on December 10 and the other on December 13, 1909, regarding one John M. Woods, then mayor of Somerville and seeking re-election. The article of December 10 charged in substance that Woods was intoxicated on the evening of July 5, 1909, at a celebration on Josephine Avenue in Somerville; that while mayor he aided

and abetted in the violation of the law relating to the sale of intoxicating liquors in Somerville, a no-license city; that he accompanied members of the committee of the fire department of the board of aldermen on an automobile trip to New Bedford, that liquor was taken along with the committee and that some members of the party were so intoxicated upon their return that night to Somerville that they were but a little short of helpless. The article printed in the issue of December 13, 1909, was an editorial which was in reply to a circular letter published by Woods denying the charges contained in the article of December 10. It referred to that article, reaffirmed it and stated among other things that "The Sun is prepared, Mr. Mayor, to prove each and every allegation it has made against you in these columns."

The first indictment charged George H. Pratt with the publication of the libel contained in the article published in the Somerville Evening Sun of December 10, 1909; and the second indictment charged Pratt and E. Eben Bayliss jointly with the publication of the libels contained in both of the articles.

The three indictments were tried together before Bond, J.

The evidence bearing upon whether the defendant Bayliss, who was a clergyman, legally was responsible for the libels or for any part of them was in substance as follows:

Testimony of Woods was to the effect that he saw the defendant Bayliss for the first time about July 8, 1909, at his office in East Cambridge; that at that time Bayliss was ushered into his private office and laid down his card which stated that Bayliss was a correspondent connected with the New York Tribune; that Bayliss stated to him that he was sent by the Tribune to investigate the result of no license in the cities of Massachusetts, and asked what was the experience in Somerville. Woods replying, "Very satisfactory," Bayliss said, "By the way you were on Josephine Avenue the night of the fourth of July?" Woods said, "Yes, sir." Bayliss said, "You were drunk." Woods said, "What, sir?" Bayliss said, "I have six or eight affidavits to prove that." Woods said, "Publish one of them and I will prosecute the signers to the full extent of the law. Good-day." Bayliss called Woods on the telephone about two weeks later and said, "I am the man who talked with you about the Josephine Avenue affair." Woods recognized the voice as that of Bayliss and told him that he had no time to talk with him and hung up the telephone. Woods had another talk with Bayliss at his private office at the city hall. Bayliss was introduced by the mayor's private secretary as Mr. Saville. When he came into the door of the office Woods recognized him. He had a green bag, pulled out a slip of paper and left it. Woods said, "Get out of this office as quick as you can," and he did, saying as he went out, "You can't scare me. Nolan will attend to you." Nolan was the democratic candidate for mayor in opposition to Woods.

One Carter, lieutenant of the Somerville police, one Kendall, chief of police, and one Damery, a police officer, testified that on November 22, 1909, they had an interview with the defendant Bayliss, in which, among other things, Bayliss said that he had an article about the Josephine Avenue affair all written up and sealed in a safe in the hands of a printer ready to be published at the word from him, Bayliss; that he did not give the name of the printer; that on November 26, 1909, Bayliss wrote to Kendall a letter as follows:

"I have not heard from you (as you promised) regarding the matter about which you and others came to see me. As the time is drawing near for the decision of the case I want that something shall be done at once. I understand that the gentleman under consideration is on the program for an address, in the interests of no-license, in the Rev. Mr. Grant's church, the Sunday evening prior to election. Would it not be wise to have a settlement of the question, which is vital, before the public have to render their decision? As you, with the other gentlemen, were the emissaries from my friend, I continue the motion with you; otherwise I should have taken up the case with the party of the first part. Prompt attention to this matter will illuminate the situation greatly."

One Lowe testified that in December, 1909, he was a newspaper reporter in the employ of the Somerville Evening Sun; that some time during the first week or ten days of December, 1909, he went to see the defendant Bayliss, and interviewed him; that Bayliss told him the facts contained in the article published on December 10. He testified in detail, as to

each statement contained in the articles, that the defendant Bayliss told him each statement.

Upon cross-examination Lowe testified that the defendant Bayliss appeared to be somewhat provoked that the witness had called upon him, saying that he did not like to talk about the matter until he heard from the mayor, that he wanted to give the mayor a fair chance to answer a letter that he had written to him and that he did not wish a publication of the interview until the mayor had answered the letter.

Kendall, the chief of police of the city of Somerville, also testified that he had another talk with the defendant Bayliss on December 8 or 9, 1909, at the police station, that Bayliss came of his own accord to his office between nine and ten o'clock in the morning and said, "In view of your not coming to see me I thought that I would come and see you. I have an appointment with a number of prominent citizens this afternoon at three o'clock, and as long as you acted for the mayor I came to give you the last chance. I have a lot of matter prepared, and if you will meet me at Young's Hotel to-day at twelve o'clock I will show you what I have." Kendall said to him, "By way of illustration, supposing that Mayor Woods should deny your allegations?" Bayliss said, "In that event I shall publish them." Kendall said, "By the way of illustration, suppose that Mayor Woods should admit them, what then?" He said, "I would treat him as a brother. I have spent about ten days gathering this information, and I would treat him fairly in the matter."

At the close of the evidence the defendant Bayliss requested that a verdict of "not guilty" be ordered in the case against him. The presiding judge refused the request.

All of the defendants made numerous requests for rulings. The twenty-first and twenty-second rulings asked for by the defendant Bayliss and refused by the judge, as stated in the opinion, were as follows:

"21. Assuming that John M. Woods, named in the indictment, was a candidate for re-election to the office of mayor at the time alleged in the indictment, then if the jury are satisfied that the charges as alleged in the indictment were reasonable criticism and comment upon the real acts of the said John M. Woods, and the consequences likely to follow from said acts, no conviction

can be had under the indictment even though such criticism and comment were severe and sarcastic and tending to ridicule the said John M. Woods.

"22. If the jury are satisfied that the defendant Bayliss merely quoted or referred to statements as made by other persons with whom he talked and that he added nothing thereto, nor gave such quotations new sanction, except fair comment and criticism then the same were privileged, and said defendant Bayliss cannot be convicted under the indictment without proof of actual malice."

All of the defendants were found guilty and alleged exceptions. Other facts are stated in the opinion.

- S. L. Powers, for the defendants Pratt and the Somerville Evening Sun.
 - W. F. Porter, for the defendant Bayliss.
 - J. J. Higgins, District Attorney, for the Commonwealth.

Knowlton, C. J. These exceptions were taken at the trial of three indictments, all growing out of publications of alleged libels in the Somerville Evening Sun, a newspaper published in Somerville. The person alleged to have been libelled was John M. Woods, then the mayor of Somerville and a candidate for reelection. An important question is raised by the exceptions in reference to the extent of the qualified privilege enjoyed by voters in discussing the character and qualifications of a public officer who is a candidate for re-election.

One of the defendant's requests for rulings was as follows: "Assuming that the John M. Woods named in the indictment was a candidate for re-election to the office of Mayor of Somerville on or about December 10, 1909, then the printing and publication of the charges as alleged in the indictment was privileged and no conviction can be had of either defendant if the jury are satisfied that he believed said charges and had reasonable ground for his belief in them and acted in good faith in uttering them, unless actual malice is proved." The charges alleged in the indictment were of misconduct, of intoxication, and of maladministration of office, and were plainly defamatory. The subject to which they purported to relate, namely, the fitness of Woods to hold the office of mayor, was one of public interest, and was especially of interest to the voters of the city of

Somerville. It is the rule everywhere that fair and reasonable comment and criticism upon the acts and conduct of public men, and especially of candidates for public office, are privileged, if made in good faith. But it is generally held that this privilege does not include the right to make false statements of fact, or falsely to impute to an officeholder malfeasance in office. On the other hand, it is held in some jurisdictions that if erroneous, defamatory statements of fact are made by a voter in good faith, without malice, against a candidate for office, in an honest belief, founded on reasonable and probable grounds, that the statements are true, they are protected by the privilege of the voter. See cases cited in 18 Am. & Eng. Encyc. of Law, (2d ed.) 1040, 1042, notes; 25 Cyc. 400, 404, notes.

In this Commonwealth it has been decided that false statements of fact in regard to the conduct of a public man are not privileged, merely because the manner in which he performs his public duties is a matter of general interest to the people whom he was chosen to serve, while comment and fair criticism are permissible, even though they are very disparaging. tinction is pointed out and affirmed in Burt v. Advertiser Newspaper Co. 154 Mass. 238, and is reasserted in Dow v. Long, 190 Mass. 138, 141, and in Hubbard v. Allyn, 200 Mass. 166, 170. The only question upon this part of the case that is not covered by our decisions, is whether the rule limiting privilege to fair comment and criticism, as distinguished from erroneous statements of fact, made honestly, shall be applied to publications in regard to candidates for a public office, as it is applied to publications in regard to the conduct of public men, and other ordinary matters of public interest. While there are dicta in our books that would furnish some ground for an answer in the negative, we are of opinion that the weight of reasoning and authority requires us to answer in the affirmative.

Most publications in regard to candidates for office are general, and reach a large number of persons besides those who are interested as electors. Moreover, many of the charges touching conduct and private character affect only remotely the fitness of the candidate for the performance of the duties of a particular office, while, if false, they may be exceedingly damaging. These and other considerations, make it proper to limit the privilege as to

statements touching only the general interest of the whole community, and likely to become generally known, as it is not limited in making statements to a particular person to whom one owes a duty, as in answering an inquiry as to the character of a servant. We are of opinion that there was no error in the refusal of this request. For other cases in Massachusetts bearing upon the general subject, see Commonwealth v. Clap, 4 Mass. 163; Dodds v. Henry, 9 Mass. 262; Bradley v. Heath, 12 Pick. 163; Curtis v. Mussey, 6 Gray, 261; Smith v. Higgins, 16 Gray, 251; "Joannes" v. Bennett, 5 Allen, 169; Commonwealth v. Wardwell, 186 Mass. 164; Haynes v. Clinton Printing Co. 169 Mass. 512.

As to all the charges alleged to be libellous, the jury were instructed that if they were true, the defendant should be acquitted. R. L. c. 219, § 8.

The defendant Bayliss' twenty-first request for an instruction was rightly refused because it did not refer to the possibility of conviction on the ground of express malice. We are also of opinion that this and his twenty-second request and other similar requests were rightly refused, because the charges relied on by the Commonwealth were all of matters of alleged fact and none of them purported to be made as reasonable criticism or comment upon the real acts of Woods, or the consequences likely to follow from his acts. The requests were, therefore, inapplicable to the evidence.

The instruction that the truth, if proved, was a justification of the statements, in the absence of express malice, sustains so much of the defense as was applicable to these charges under the law. If the charges as to matters of fact were shown to be true, there was complete justification, as there was nothing else left that was libellous. If they were not true, there was no part of the defamatory language that was a fair criticism and reasonable comment on facts. The defendants were not injured by the failure of the judge to instruct the jury as to the law of qualified privilege.

The defendant Bayliss contends that there was no evidence that would warrant the jury in finding him legally responsible for the libels, or any part of them. We are of opinion that the judge was right in leaving to the jury the question whether he arranged to state libellous matter to a person representing the newspaper, and whether it was so published in pursuance of that arrangement. Although there was some contradiction, there was much evidence and many circumstances tending to show that he intended that this libellous matter should be published against Woods, and there was no dispute that he furnished the substance of it to the reporter of the newspaper, knowing that it was being taken with a view to its ultimate publication. Without reviewing the testimony, we are of opinion that there was no error in this part of the case.

Exceptions overruled.

JOHN SOLEY AND SONS, Incorporated, vs. J. Edwin Jones & another.

Suffolk. March 7, 1911. — May 17, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Contract, In writing, Construction. Damages, In contract.

In an action for a balance alleged to be due under a contract in writing, whereby the plaintiff agreed to do for the defendant all the shoring for underpinning buildings in a certain section of the Washington Street tunnel in Boston, which the defendant was engaged in constructing under a contract made by him with the city of Boston through the transit commission of that city, it appeared that the contract of the defendant with the city contained a clause giving the transit commissioners the right to terminate it if the engineer should certify to them in writing that the contractor was not making such progress in the execution of the work as to indicate its completion within the required time, and that, after a part of the work under the plaintiff's contract had been done by the plaintiff and had been paid for by the defendant, the defendant's contract with the city of Boston had been terminated by the transit commissioners under that clause. The plaintiff's contract contained a provision that all the work should be done according to orders and directions and to the satisfaction of the transit commissioners or their authorized agents, and the plaintiff at the time of making his contract with the defendant had a copy of the defendant's contract with the city and was familiar with its provisions, including that relating to the commissioners' right to terminate it. Held, that, the plaintiff and the defendant having made their contract with knowledge of the possibility of such a termination of the defendant's contract with the city as had occurred and having failed to provide for such a contingency reasonably to be anticipated, the defendant was bound by his absolute promise to pay the plaintiff the contract price for the work stipulated for in his contract; so that the plaintiff was entitled to recover the unpald balance of such contract price after deducting from it the reasonable cost of completing the work in accordance with the terms of his contract.

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CONTRACT for a balance of \$8,000 alleged to be due to the plaintiff under a contract in writing, which is printed below, by which the plaintiff agreed to do all the shoring for underpinning buildings in section 8 of the Washington Street tunnel in Boston, in the vicinity of Boylston Street and Hayward Place in that city, which the defendants were engaged in constructing under a contract made by them with the city of Boston through the transit commission of that city. Writ dated September 12, 1905.

The contract between the plaintiff and the defendants, of which a copy was annexed to the declaration, was as follows:

"Articles of agreement entered into this ninth day of January, 1905 between John Soley & Sons, a corporation, of Chelsea and Hyde Park, Massachusetts, and J. Edward Jones and Michael Meehan, co-partners doing business under this name of Jones & Meehan;

"Witnesseth:

"That for and in consideration of \$7000.00 to be paid by said Jones & Meehan to said John Soley & Sons in monthly payments based upon the estimate in writing of the Engineer in the same proportion to the entire contract price as the contractor shall be paid.

"It is further agreed that the said John Soley & Sons shall do all the shoring for underpinning buildings according to plans and specifications of Section 8, Washington Street Tunnel, so-called, and they are to do such extra shoring as may be necessary for all alterations in the two store fronts of the Arioch Wentworth Building, including the putting in of all columns and I beams.

"It is further agreed by and between the parties to this agreement that any sums charged by the Boston Transit Commission for the occupation of street space by the shores of the said John Solev & Sons, shall be equally divided.

"It is further agreed that in case the alterations in said store fronts are not made the sum of \$150.00 shall be deducted from the above contract price.

"The foregoing includes the shoring work proper by the said John Soley & Sons, shoring area walls as far as practicable, incidental repairs to fronts of buildings, but does not include incidental excavations, repairs to sidewalks and areas, repairs and charges necessitated in basements nor mason work of underpinning.

"All work to be done in a careful and workmanlike manner according to orders and directions and to the satisfaction of the Boston Transit Commission or their authorized agents.

"Said John Soley & Sons shall pay all costs, damages and fines arising from their non-compliance with said plans and specifications and contract.

"Jones & Meehan,
John Soley & Sons, Inc.
By W. A. Soley, Treas."

In the Superior Court the case was tried before *Hardy*, J. The case was referred to Arthur P. Hardy, Esquire, as auditor, who filed a report. The following facts appeared in evidence:

The defendants on December 19, 1904, entered into a contract with the city of Boston, acting by the Boston transit commission, for the construction of section 8, so called, of the Washington Street tunnel, in Boston. On January 9, 1905, the defendants made with the plaintiff the contract printed above.

The plaintiff's president and treasurer had a copy of the defendants' contract with the city of Boston and the construction plans before the execution of the contract of the plaintiff with the defendants and testified that at that time they were familiar with its contents.

The plaintiff began work under its contract and prosecuted it until July 18, 1905, when it ceased work, on learning that the Boston transit commission had terminated the contract of the city of Boston with the defendants. The work done by the plaintiff was satisfactory. The plaintiff admitted that of the work required to be done under its contract it had not completed at the time it ceased work the shoring of two piers and the shoring of a building on Essex Street. In addition to this work which had not been done the defendants contended and offered evidence tending to show that the plaintiff was required under the contract, and that it was practicable, to shore area walls to the extent of two hundred and eighty-five feet and that this had not been done when the plaintiff ceased work. The plaintiff offered evidence tending to show that it was not practicable to shore this area wall.

The provision of the contract of the defendants with the city of Boston under which that contract was terminated by the transit commissioners was as follows: "If at any time the engineer shall be of the opinion, and shall so certify in writing to the commission, that the said work is unnecessarily or unreasonably delayed, or that the contractor is wilfully violating any of the conditions or agreements of this contract, or is not executing said contract in good faith, or is not making such progress in the execution of the work as to indicate its completion within the required time, or is not properly supporting or protecting adjacent pipes and structures, the commission may notify the contractor to discontinue all work, or any part thereof, under this contract; and thereupon the contractor shall discontinue said work, or such part thereof as the commission may designate."

The plaintiff contended that it was entitled to recover the contract price, namely, \$7,000, less any sums paid on account, and less what it would have cost the plaintiff to finish the work by shoring the two piers above referred to and the building on Essex Street. The plaintiff refused to make any deduction because of area walls and contended that under the contract no deduction should be made therefor.

The defendants contended that the plaintiff was entitled to recover only the fair value of the work actually done by it, allowing it a reasonable profit thereon, and that any deductions from the contract price for work not done should not allow the plaintiff in effect to recover the profit it would have made if all the work provided for in the contract actually had been done.

There was no dispute as to the amount of the payments made on account, which was agreed to be \$3,900.

The judge ruled that evidence as to the causes for the termination of the contract between the defendants and the city of Boston, represented by the transit commission, was not material, and no evidence was introduced with reference to this subject. The judge instructed the jury that there was no evidence from which the jury could impute blame to the defendants in the termination of that contract with the city of Boston, and no inference against the defendants was to be drawn because of the act of the transit commission in terminating that contract, as the

right to terminate was reserved to the transit commission in its contract with the defendants.

At the close of the evidence the defendants asked the judge to give, among others, the following instructions to the jury:

- "1. Under the first count of the declaration the plaintiff is entitled to recover only the same proportion of the entire contract price as the defendants received under their contract with the transit commission on account of the work done by the plaintiff.
- "2. Under the first count of the declaration the measure of damages is the fair value of the work actually done, allowing the plaintiff a reasonable profit for such work."
- "6. Under the first count of the plaintiff's declaration the plaintiff is not entitled to recover the profit it might have made on the work not done if the contract had been fully performed."

The judge refused to give any of these instructions, and on the question of damages instructed the jury as follows:

"The plaintiffs are entitled to compensation for the work done so far as it was done here, substantially performed, less the proper deductions that were to be deducted from that amount because of the termination of the work, because they have not completed it. Now, that deduction, in accordance with my instructions to you is, what would be the cost to the plaintiffs to complete the work that remained to be done, considering that the materials that were to be used in connection with it and the tools were there upon the premises, what would be the market value of the work to be done, that is, what would be the reasonable cost? Of course profit upon any contract depends upon the difference between the cost to the man who performs the work and the amount that he may have received for the work to be done. The contractor in this case, of course, had to furnish labor, superintendents of labor, materials in connection with the shoring, tools. Tools were liable to depreciation. Cost of insurance is to be considered in connection with that. And that is all that you are to consider here, what was the difference what was the actual cost to him, so far as you can deal with that



There were three counts in the declaration, but the case was tried only on the first, which was for the balance due under the contract. The second count was waived by the plaintiff, and upon the third count a verdict for the plaintiff in the sum of \$70.78 was agreed to.

proposition here upon the evidence presented to you, what would be a fair cost — of course I don't mean actually in the sense that it was performed by him — but what would be the fair, reasonable cost to complete the work."

On the first count the jury returned a verdict for the plaintiff in the sum of \$8,641; and the defendants alleged exceptions.

The case was submitted on briefs.

W. P. Mechan & C. H. Donahue, for the defendants.

L. L. G. de Rochemont, for the plaintiff.

Braley, J. It is a general rule, that parties cannot be relieved from their contracts fairly made with full knowledge of the facts, although they may have mistaken their rights or have failed to restrict sufficiently their liabilities. Hawkes v. Kehoe, 193 Mass. 419. The defendants knew that by its terms their contract with the transit commissioners could be cancelled and discharged, if the engineer gave a certificate that they were not making such progress in the execution of the work as to indicate that it would be completed within the period fixed for performance. It was with this knowledge that they entered into the agreement with the plaintiff as a subordinate contractor to perform a part of the work. The impossibility of the defendants' performance of the plaintiff's contract, if the contingency arose, could have been foreseen and provided for in the instrument. A provision that the promise should be dependent upon the continued existence of the principal contract would have been sufficient to protect the defendants, if the plaintiff was compelled to abandon the work, because the contract with the commissioners was terminated. New Haven & Northampton Co. v. Hayden, 107 Mass. 525, 581. It is the defendants' contention, that, when construed in connection with the circumstances, such a condition appears by implication or is an unexpressed term of the agreement. Hebb v. Welsh, 185 Mass. 835, 886. The plaintiff's contract contained a clause providing that the work should be performed subject to the directions and to the satisfaction of the commissioners or of their authorized engineer, and the plaintiff concedes that the amount and character of the work could be ascertained only by resort to the specifications of the main contract. If the principal contract in its entirety had been referred to by appropriate language it would have been incorporated, but it cannot be read

into the agreement by implication, where only that part which is germane to the plaintiff's performance may be implied, and the language is unambiguous. De Friest v. Bradley, 192 Mass. 846, 853. Lipsky v. Heller, 199 Mass. 810, 815. The auditor, whose finding is not questioned, reports that the plaintiff at the time of execution knew not only of the specifications under which its work must be done, but of the article of cancellation. It apparently acted upon this information when it ceased work upon having been informed that the right of termination had been ex-The act of the commissioners and its decisive effect upon the plaintiff's right to go forward under the contract having been known to each party, further notice from one to the other of their several rights or demands would have been a vain formality. Cumberland Glass Manuf. Co. v. Wheaton, ante, 425. It is urged that, the possible disability which would prevent performance by the defendants having been known to the plaintiff at the inception of the contract, it was mutually understood that the defendants did not intend to perform, and that the plaintiff had no expectation of performance, unless the principal contract remained in force. But while we can construe the contract in writing which the parties made, we cannot make a contract for them. It is only where an unanticipated event happens, which was not in the contemplation of the parties at the inception of the contract and upon which the continued existence of the contract must depend, that upon the happening of the event the contract is dissolved and the promisor is relieved from further performance. Butterfield v. Byron, 158 Mass. 517. Hawkes v. Kehoe, 198 Mass. 419, 423. Vickery v. Ritchie, 202 Mass. 247, Rowe v. Peabody, 207 Mass. 226. Sun Printing & **251**. Publishing Association v. Moore, 188 U. S. 642. Baily v. De Crespigny, L. R. 4 Q. B. 180, 185. If the plaintiff and the defendants contracted with knowledge of the clause of termination, the defendants of course knew that when the principal contract came to an end either with or without their fault further performance by the plaintiff would be impossible. Instead of providing for a contingency reasonably to be anticipated, the defendants gave an absolute promise to pay the contract price on the basis that there should be no interference with the work of construction if the plaintiff's conduct was satisfactory to the

commissioners as it appears to have been. Having made themselves responsible for the existence of the subject matter of the contract until without fault on the plaintiff's part it had been performed, they are not within the exception or principle of construction recognized and followed in Wells v. Calnan, 107 Mass. 514; Butterfield v. Byron, 158 Mass. 517; Young v. Chicopee, 186 Mass. 518; Angue v. Scully, 176 Mass. 857; and Hawkes v. Kehoe, 198 Mass. 419, where the occurrence which discharged the contract was of such a character that the parties were held not to have had it in contemplation at the making of the agree-See Hebert v. Dewey, 191 Mass. 408, 411; Vickery v. Ritchie, 202 Mass. 247. The rulings on the question of liability upon which the measure of damages under the first count of the declaration must rest, to the effect that the causes for the termination of the principal contract were immaterial as the commissioners had reserved that right, and that there had been a breach, were in accordance with our construction of the rights of the parties. The contract not having been dissolved, the plaintiff was not remitted to compensation for the fair value of the work done with a reasonable profit for such work and also upon the work remaining to be performed, or restricted to a sum which would be proportionate to the contract price the defendants were to receive from the commissioners. But it was entitled to the benefit of the contract, after deducting from the contract price the reasonable cost of completing the work. Olds v. Mapes-Reeve Construction Co. 177 Mass. 41. Norcross Brothers Co. v. Vose, 199 Mass. 81. Gagnon v. Sperry & Hutchinson Co. 206 Mass. 547. The rulings requested were rightly refused, and the instructions given were correct.

Exceptions overruled.

GEORGE H. CHANDLER vs. MATHESON COMPANY OF BOSTON.

Plymouth. March 7, 1911. — May 17, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Negligence, In use of highway.

In cases of collision between travellers upon the highway where the law requires that each traveller shall use the way with due regard for the rights of every other, the question of the care or negligence of either traveller, depending for solution as it does upon a variety of circumstances about any one of which the evidence may be conflicting, generally is for the jury.

At the trial of an action for personal injuries and damages to the plaintiff's horse and wagon, caused by a collision with an automobile driven by an employee of the defendant, it appeared that the accident happened on a country road between ten and eleven o'clock at night, and that the plaintiff's team carried no lights; and there was evidence tending to show that the plaintiff saw the lights carried by the defendant's automobile a long way off on a straight part of the road and turned to one side of the road and more than half way out of the travelled part of the way and was standing still and waiting for the automobile to pass, when the collision occurred, and that there was not room for two vehicles to pass in the commonly travelled part of the way. Held, that the questions, whether the plaintiff was exercising due care and whether the defendant's employee was negligent, were for the jury.

TORT for personal injuries and damage to the plaintiff's horse and wagon resulting from a collision with an automobile of the defendant. Writ dated March 12, 1908.

In the Superior Court the case was tried before Raymond, J. After a verdict for the plaintiff, the presiding judge disallowed a bill of exceptions presented by the defendant, and the defendant filed in this court a petition for the establishment of its exceptions. The petition was referred to Robert Homans, Esquire, as commissioner, to settle the truth of exceptions. From his report it appeared that there was evidence tending to show that at the time of the collision the defendant's automobile was being driven by a chauffeur in its general employ for the purpose of "demonstrating" it to one Batchelder, who was riding therein and was a possible purchaser of it. The plaintiff was driving in a wagon drawn by one horse upon the public way from Marshfield Hills to Marshfield between the hours of ten and eleven o'clock at night.

The plaintiff testified that in the road beyond the place where

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the accident happened "there is a turn" and "pine trees each side of the road," that he was familiar with the road and had driven over it frequently for many years previous to the accident; that his conveyance carried no lights or other means to warn approaching vehicles of its presence; that as he rounded the turn in the road a little distance from the place of the accident, he saw a long way off the lights of the approaching automobile; that for five hundred feet straight ahead from the point of the accident the road was level, or nearly so, and straight; and that he could observe the approach of the automobile all of that distance; that he saw that the search lights of the automobile were not lighted; that he had operated an automobile himself; that he saw that the automobile carried all the lights required by law; that he knew that the occupants of the automobile could see only a short distance shead in the darkness. "I saw this automobile coming and I turned out of the roadway, I turned way out into the ditch so that I stayed there on the nigh side of my wagon and I drove my horse out of the road into the grass so that she was walking out of the travelled part of the road in the grass, and this automobile came up"; that at the time of the collision his team had been standing still at the side of the road for a minute or so, waiting for the automobile to pass. "The first thing I knew we came together. When he got close to me, of course I could not see how close he was to me, his lamps shone in my eyes; I could not see he was going to hit me. The first intimation I had of any collision was when we came together"; that the travelled part of the road was about ten feet wide with a crown of twelve inches; that there was a worn or travelled part commonly used by vehicles going in either direction in a single pathway, which was about in the centre of the wrought surface of the road; that there was not room on the commonly travelled part of the roadway for two vehicles to pass and that at the point where the accident happened the automobile was travelling as they ordinarily did travel "in this travelled space in the road" where most teams travelled.

The defendant's treasurer, the chauffeur of the automobile and also Batchelder, were all called to testify by the plaintiff.

At the close of the plaintiff's evidence the defendant rested and asked the presiding judge to rule as follows:

- "1. On all the evidence the plaintiff cannot recover.
- "2. On all the evidence the driver of the automobile was a servant loaned by his employer, the defendant company, to Batchelder, and at the time of the accident was rightfully under Batchelder's control, and for his negligence, if any, at the time of the accident, the defendant is not liable."

The judge refused so to rule. The jury found for the plaintiff in the sum of \$6,877; and the defendant alleged exceptions.

In this court the defendant waived its exception to the refusal to give the second ruling requested.

- H. C. Sawyer & W. V. Taylor, for the defendant, submitted a brief.
 - C. A. Warren, for the plaintiff.

Hammond, J. While the plaintiff was driving upon the highway a collision occurred between his carriage and an automobile driven by a servant of the defendant. In cases of collision between travellers upon the highway where the law requires that each traveller shall use the way with due regard for the rights of every other, the question of the care or negligence of either traveller, depending for solution as it does upon a variety of circumstances about any one of which the evidence may be conflicting, is generally for the jury. After a careful reading of the evidence we are of opinion that the questions of due care of the plaintiff and negligence of the defendant's servant were for the jury.

Exceptions overruled.

MICHAEL J. IGO vs. CITY OF CAMBRIDGE. SAME vs. L. D. WILLOUTT AND SONS COMPANY.

Middlesex. March 7, 8, 1911. — May 17, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Way, Defects in highway. Negligence, In use of highway, Proximate cause, Plaintiff's due care.

In an action against a city under R. L. c. 51, § 18, for personal injuries alleged to have been sustained by reason of a defect in a highway of the defendant, it appeared that the plaintiff in the exercise of due care was driving four horses

attached to a heavily loaded wagon, when the horses were frightened by a portable engine maintained in a temporary shelter on the highway for use in the erection of a building, which was being operated negligently by the engineer of the building contractor, that the horses became uncontrollable and turned one of the wheels of the wagon into an open trench in the highway, so that the plaintiff was thrown from his seat and sustained the injuries complained of. It further appeared that the trench had been dug by the water department of the defendant, and that, after the defendant had received reasonable notice of its dangerous character, it had been left wholly unguarded without any precautions being taken to warn travellers of the danger. *Held*, that the action could not be maintained because the defect in the highway was not the sole cause of the plaintiff's injuries.

A contractor, who is granted a permit by the proper officers of a city to maintain and operate a portable engine in a temporary shelter upon a highway of the city, which is not closed to public travel, must use reasonable care not to operate the engine in a manner that is likely to frighten horses when being driven near it by travellers on the highway.

In an action against a contractor for personal injuries alleged to have been sustained by reason of the negligence of an engineer of the defendant in suddenly starting a portable engine maintained under a permit from a city in a temporary shelter on a highway of the city, at the moment when the horses driven by the plaintiff were passing near it between the temporary shelter and an open trench, thus causing the horses to become uncontrollable and to turn one of the wheels of the wagon into the trench so that the plaintiff was thrown from his seat and injured, it is no defense that the accident would not have happened if the trench in the highway had not been left by the city open and unguarded.

The driver of four horses attached to a heavily loaded wagon, who in passing through a street of a city sees ahead of him on his right an open trench unguarded and on his left a temporary shelter in which a portable engine is maintained on a portion of the highway for use in the erection of a building, if his horses have not shown signs of fright and there is room in the street for his team to pass safely between the trench and the temporary shelter of the engine, and he has no reason to anticipate that the engineer in charge of the engine will start it up suddenly at the moment that his horses are passing near it, cannot be said as matter of law to be negligent in attempting to drive between the trench and the engine, although while he is doing so the sudden starting of the engine frightens the horses and makes them uncontrollable, so that they turn a wheel of the wagon into the trench and he is thrown from his seat and injured.

Two actions of tort for personal injuries sustained by the plaintiff on December 8, 1908, at about half past nine o'clock in the morning, while he was a traveller upon a public highway in the city of Cambridge, the first action being against that city under R. L. c. 51, § 18, and the second action being against a corporation, carrying on the business of a building contractor, whose engineer was alleged to have caused the injuries by negligently frightening the horses which the plaintiff was driving. Writs dated January 11, 1909.

In the Superior Court the cases were tried together before Fox, J. There was evidence that the plaintiff was driving on that part of Brattle Street in the defendant city which connects Harvard Square and Brattle Square; that Brattle Street was a public highway; that the plaintiff was driving four horses attached to a manure wagon containing manure of the weight of about three tons; that he had worked for the same employer for fifteen years and had driven for a number of years the same horses over the same route; that the horses would not run or jump at ordinary noises and that he never had had any trouble with these horses before the accident; that he was familiar with the road, and had driven over the part of Brattle Street where the accident occurred on his way in town between half past six and seven o'clock on the morning of the accident, and that at that time there was no excavation in the street. Later on in the forenoon, returning with his team loaded, he entered Brattle Street, driving his horses at a walk on the right hand or out-bound car track. An out-bound electric car approached him from behind and he swung to his right to get off the track. After this car passed, he continued to drive his horses at a walk along the right hand side of Brattle Street until about twenty feet in front of his two leading horses he saw an excavation in the street some four feet in width and four or five feet in length, next to the right hand outward car track. The trench was being dug by the water department of the defendant city for the purpose of putting in or repairing a water pipe, and one Shea of the water department was present and was in charge of the work. The plaintiff saw one employee of the water department of the defendant city working in this trench and another employee shovelling the dirt which had been thrown toward the sidewalk. There was no barrier, railing or flag placed or erected around the excavation in the street at the time of the accident, and no one was stationed there whose duty it was to notify travellers of any danger. The dirt from the excavation had been thrown to the right of the trench to one approaching from Harvard Square, and the plaintiff testified that this dirt made the right hand side of the street on which he was travelling impassable for his team. He then swung his horses toward the left hand side of the street, and his leading horses approached to within three or four feet of a temporary

engine house sheltering a portable engine placed there by the defendant company, under a license from the defendant city, which was to be used in the erection of a building being constructed by the defendant company at the corner of Brattle and Boylston Streets, whereupon the engineer started his engine and continued to run it until after the accident, and the horses became frightened and turned sharply to the right. The plaintiff was unable to hold them, and they turned the right hind wheel of the plaintiff's wagon into the hole, causing the plaintiff to fall from the wagon seat, a distance of about eight feet to the ground and to sustain the injuries for which these actions were brought.

The permit given by the defendant city to the defendant company authorized the company to occupy a space in the street six feet in width and eighty feet in length outside the sidewalk or curb and it was within a portion of this space that the defendant company erected its engine house. The excavation was made nearly opposite the engine house. A plank walk two feet in width had been laid by the defendant company as a way for foot passengers outside the space occupied by the company and the engine house projected into the street six feet beyond the sidewalk. The entire space in the street from the plank walk to the opposite curb open to travel by horse drawn vehicles and electric cars at the place of the accident was thirty-one feet. There were two lines of car tracks in this part of Brattle Street, one for outward bound cars and one for inward bound cars from and to Boston.

It appeared in evidence that on the morning of the accident a police officer of the defendant city several hours before the accident notified Shea that this was a bad place and told him not to leave it unguarded. This evidence was admitted for the sole purpose of proving notice to the defendant city of the conditions of the way at the time of the accident.

At the close of the evidence the judge, by consent of counsel, sent the cases to the jury for the assessment of damages only, and the jury assessed the damages in the sum of \$1,500 in each case. Thereupon the judge ruled that the plaintiff was not entitled to recover, directed verdicts for the defendants, and reported the cases for determination by this court. By agreement

of counsel as to each case, if the ruling of the judge was right, judgment was to be entered for the defendants; otherwise, judgment was to be entered for the plaintiff in the sum of \$1,500 with interest from June 22, 1910.

- S. A. Fuller & H. R. Skinner, for the plaintiff.
- J. F. Aylward, (F. M. Phelan with him,) for the city of Cambridge.
 - C. S. Knowles, for L. D. Willcutt and Sons Company.

BRALEY, J. If it became necessary for the water department of the defendant city either to lay or to repair a water pipe in the public way over which the plaintiff was driving when injured, the jury could find that to open a trench of the dimensions stated, without taking any precautions to warn travellers of the danger, rendered the street defective and unsafe. Norwood v. Somerville, 159 Mass. 105. Torphy v. Fall River, 188 Mass. 810, 818. R. L. c. 51, § 1.

To maintain the action, the plaintiff under R. L. c. 51, § 18, must prove that the defect was the sole cause of his injuries. The city had authorized the defendant company to erect a temporary engine house on a portion of the street nearly opposite the excavation, which narrowed the roadway, and as the plaintiff's team was passing the engineer started the engine. The escaping steam, apparently discharged into the street, so frightened the horses that they began to run, and while uncontrollable the wagon plunged into the trench, when the plaintiff was thrown from his seat to the ground. If the loss of control could have been found to have been only momentary, and instantly would have been regained if the wagon had not come in contact with the defect, the plaintiff would have been entitled to recover, as the city does not contend that he was careless or that it did not have notice of the defect. Babson v. Rockport, 101 Mass. 98. But, it having been undisputed that the horses were beyond his control when the accident happened and but for their fright the wagon would not have fallen into the trench, the verdict for this defendant was rightly ordered. Titus v. Northbridge, 97 Mass. 258. Horton v. Taunton, 97 Mass. 266. Fogg v. Nahant, 98 Mass. 578; S. C. 106 Mass. 278. Lynn Gas & Electric Co. v. Meriden Fire Ins. Co. 158 Mass. 570, 576. Feeley v. Melrose, 205 Mass. 829.

The defendant company, outside of the portion occupied by its engine house under the permit, had no exclusive use of the street, which had not been closed to public travel. If permitted for its own convenience and benefit to maintain and operate the engine, yet it knew or could be found to have known that the street was being concurrently used by the public. It is common knowledge that horses are likely to become restive and perhaps unmanageable from fright caused by the hissing sound of emitted steam, and the defendant was required in the operation of the engine to use reasonable care not to frighten passing teams. was for the jury and not for the court to determine, whether the defendant's engineer, who seems to have had convenient facilities for observation, acted with reasonable care in starting the engine before he ascertained whether a team was passing in such proximity that its operation might imperil the safety of travellers. If the jury found that the engineer was negligent, the defendant was responsible for the accident, which as we have said would not have happened if the horses had not been so frightened as to pass from the plaintiff's control. Butman v. Newton, 179 Mass. 1.

The plaintiff, whose horses previously had not shown signs of fright, undoubtedly was aware that the trench was on his right, with the engine house on his left, but he also knew that the remaining portion of the street was sufficient in width for his team to pass safely, under visible conditions, and he had no reason to anticipate the defendant's negligence. It could not be ruled as matter of law that he acted carelessly. Stoliker v. Boston, 204 Mass. 522, 534, and cases cited.

In accordance with the terms of the report, judgment for the defendant is to be entered on the verdict in the first case, but in the second case the plaintiff is to have judgment for the sum of \$1,500.

So ordered.

MORRIS WEISMAN vs. FIREMEN'S INSURANCE COMPANY.

Bristol. March 8, 1911. — May 17, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Insurance, Fire. Referee. Notice.

In an action on a policy of fire insurance in the Massachusetts standard form, which contains the usual clause requiring that, in case of a failure of the parties to agree, the amount of loss shall be ascertained by arbitration as a condition precedent to any right of action, if the plaintiff merely shows that at his request three referees were selected, who met, heard the parties and prepared and signed an award determining the amount of the plaintiff's loss, this is not enough, and he must show further that in some way the award was made known to the plaintiff and to the defendant; because the arbitration clause requires by necessary implication that the award shall be transmitted to the parties or published by giving notice to them of the decision.

CONTRACT upon a policy of fire insurance covering household furniture and a stock of merchandise of the plaintiff alleged to have been destroyed by fire on February 15, 1909. Writ dated October 20, 1909.

In the Superior Court the case was tried before *Bell*, J., without a jury. The material facts in evidence and the findings of the judge, which in the bill of exceptions are stated very briefly, are shown better by the memorandum of decision filed by the judge [strictly not brought before this court], which was as follows:

"The evidence before me tended to prove, and I find, that in pursuance of the terms of the policy, three referees were appointed, who afterwards met and considered and agreed upon the amount of the loss. They then made out two written reports which they signed. One of these, which was produced at the trial, was defective. It consisted of two items, stock and household furniture. It stated the value of the household furniture but the value of the stock was left blank. The other report, in which the value of the stock was filled in, went into the possession of one Cooley, who was the referee appointed by the insurance company. Beyond that it was not traced. The defendant objected that an award was essential before suit could be brought and that none was proved.

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"I accordingly rule that the facts which I have found do not prove that an award was made. To make a complete award I rule that it must be delivered or published. Kingsley v. Bill, 9 Mass. 198. See also Anderson v. Miller, 108 Ala. 171, 178. . . .

"I do not find that an award was prevented by the referee appointed by the company, or through its influence, so that it would bring the case within *Grady* v. *Home Fire & Marine Ins. Co.* 27 R. I. 435, and like cases, and relieve the plaintiff from proving an award. Two referees were entitled to make the award without the action of the referee appointed by the defendant.

"I do not understand that the plaintiff desires to rely upon the award which I have spoken of, which would give him only \$59.

"The above findings and rulings require me to find for the defendant."

The judge accordingly found for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

D. R. Radovsky, for the plaintiff.

F. W. Brown & W. L. Came, for the defendant.

Braley, J. The exceptions are meagre almost to the point of obscurity, but we assume that the policy was issued under R. L. c. 118, § 60, and that the terms of the policy required as a condition precedent to any right of action, that the amount of loss should be ascertained by arbitration. But if the judge was satisfied that arbitrators were duly chosen, who met, heard the parties, and prepared and signed an award determining the loss on the plaintiff's stock and furniture, he also found that it was not delivered, or notice of their decision communicated to either party. The form of submission is not before us. It may have been oral or in writing, and may or may not have provided that notice should be given. The company, however, declined to adjust the insurance after notice and proof of loss had been given, and, if we infer that thereupon at the plaintiff's request three referees were selected as stated in the record, the purpose of the arbitration clause would be nullified, unless in some suitable form the result of the reference was made known to the plaintiff and the defendant. The board acts as an arbitral tribunal whose

decision, if accepted by the insurer, determines the amount of liability, while, if rejected, the insured may sue at once to recover for the loss. If the award is executed in duplicate and delivered to each party, it also is published, or delivery of the award to the insured, if he prevails, and notice by him to the company, with a demand for payment, is a publication. Plummer v. Morrill, 48 Maine, 184. Knowlton v. Homer, 30 Maine, 552. Rixford v. Nye, 20 Vt. 132. Or it may be published by the arbitrators reading the award to the parties. Rundell v. La Fleur, 6 Allen, 480. But whatever form may be adopted, it is clearly implied by the clause of arbitration, that to be effective and complete, the award must be transmitted to the parties, or published by giving notice to them of the decision. Kingsley v. Bill, 9 Mass. 198. The plaintiff having failed to bring himself within the condition, the judge correctly ruled, that the action could not be maintained.

Exceptions overruled.

ARTHUR A. WILLIAMS vs. M. FRANK EASTMAN.

Middlesex. March 9, 1911. - May 17, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Attachment. Officer.

If a deputy sheriff makes an attachment of personal property purposely excessive in amount, he has exceeded his authority and is liable to the owner of the property in an action of tort for any injury which his unlawful act has caused.

Where an officer makes an attachment of personal property it is his duty to decide, as best he can, whether the property attached will prove sufficient to satisfy the plaintiff's claim, and, if in the exercise of this discretion he acts in good faith, he will not be liable to the debtor for attaching through an honest mistake a greater amount of property than is necessary.

In an action against a deputy sheriff for wilfully making an attachment of the plaintiff's property excessive in amount, where there is evidence that the defendant took and held in his possession goods of the plaintiff largely exceeding in value the amount which the defendant was commanded to attach, this is a circumstance for the consideration of the jury, in connection with the other evidence, in determining the true character of the defendant's conduct, but, unless they find that the defendant made the attachment for an excessive amount wilfully, he cannot be held liable.

TORT against a deputy sheriff for an alleged malicious attachment of personal property of the plaintiff in an action brought

by the S. H. Couch Company, a corporation, with four counts, of which the first alleged that the defendant attached personal property of the plaintiff worth not less than \$30,000, consisting of his stock on hand and machinery for the manufacture of shoes in the plaintiff's factory at Wayland, upon a writ in an action of contract in which the ad damnum was only \$300 and the amount claimed in the declaration was only \$125.45 with interest from April 20, 1907, alleging also that the defendant made the excessive attachment maliciously for the purpose of injuring the plaintiff and causing him to pay money for the discharge of the attachment although he disputed the claim. Writ dated December 19, 1907.

In the Superior Court the case was tried before *Hitchcock*, J. At the trial the plaintiff waived his fourth count and the case was submitted to the jury upon the first three counts. The second and third counts related to the alleged misconduct of keepers placed by the defendant in charge of the property attached by him and are not material to the questions raised by the exceptions. Evidence was introduced by the plaintiff tending to support the allegations in the first three counts of his declaration. The testimony of the defendant tended to contradict the plaintiff's evidence.

In charging the jury the judge gave, among others, the following instructions:

- "He (the sheriff) is commanded to attach goods and property to the value of \$300. There his authority ends so far as the attachment is concerned. He has no authority under the writ to take more than \$300.
- "... if he takes more in value than that which the writ authorizes him to take, whether he may think it is less or not, he has done an act which he had no authority to do. He takes his chance in reference to that matter, but he is called upon to take property of the fair value of the amount which is stated in the process which is given him to serve.
- "The plaintiff claims in at least one count of the declaration that there was a great amount of property taken, very much in excess of \$300, and the defendant says that he made a general attachment, as is usual in such a case. A general attachment of that character, gentlemen, is not sustained in the law. . . .

Now the claim is made here by the plaintiff in the first count that there was this excessive attachment made, and if there was an excessive attachment made on that day then this defendant is liable for making such an excessive attachment."

At the close of the charge the counsel for the defendant excepted to those portions of the charge above quoted and to others in which the judge defined the responsibility of the sheriff in picking out the amount that he was commanded to attach, the counsel stating that "he did not think that the law required the sheriff to exactly determine between the parties the value of the property to be taken as strictly as appeared in the language of the court."

Upon the three counts submitted to them the jury returned a general verdict for the plaintiff in the sum of \$1,500. The defendant alleged exceptions.

G. L. Mayberry, for the defendant.

W. R. Bigelow, for the plaintiff.

BRALEY, J. If the defendant as a deputy sheriff made a wilfully excessive attachment of the plaintiff's personal property as alleged in the first count of the declaration, he exceeded his authority, and the writ under which he acted, although valid and duly returned to the court from which it issued, does not protect him or justify his conduct. Watson v. Todd, 5 Mass. 271, 272. Malcom v. Spoor, 12 Met. 279. Esty v. Wilmot, 15 Gray, 168, 169.

It is contemplated by our statutes governing attachments of personal property, that the attaching officer shall take immediate possession and hold the property so that it can be seized and applied on the execution, unless it is so bulky that it cannot be removed, or the defendant requests or consents that the property attached may remain on the premises in charge of a keeper. R. L. c. 167, §§ 43, 44, 45. Boynton v. Warren, 99 Mass. 172, 174. Cutter v. Howe, 122 Mass. 541, 544. But the amount of property to be taken must be determined by the officer. It generally would be impossible for him to take just enough personalty to cover the damages demanded in the writ, unless the attachment was of money exposed by the defendant. The nature of the property, the amount for which it probably can be sold to satisfy the execution, not merely in the market or in the ordinary



course of business but at a sheriff's sale, are all to be considered. It rests with the officer acting under these fluctuating but important conditions to decide, as best he can, whether the property attached will prove sufficient to satisfy the plaintiff's claim, while taking proper care that the rights of the debtor, who must yield to his authority, are not infringed by an unreasonable and excessive seizure. If in the exercise of this discretion, which the law confers upon him, he acts in good faith, but makes an honest mistake of judgment prejudicial to the debtor, he is not liable for abuse of process. Wilson v. Todd, 5 Mass. 271, 272. Abbott v. Kimball, 19 Vt. 551. Merrill v. Curtis, 18 Maine, 272. Davis v. Webster, 59 N. H. 471.

Where the valuation is manifestly so extreme that reasonable men would condemn his action as unnecessary and excessive, the officer may be found to have acted oppressively. Savage v. Brewer, 16 Pick. 458, 457. Holland v. Anthony, 19 R. I. 216. It is a question of fact depending upon the circumstances, and no absolute rule applicable alike to all cases can be laid down. Bergin v. Hayward, 102 Mass. 414, 426. The plaintiff's evidence no doubt tended to prove that the defendant took and held possession of goods very largely in excess of the amount he had been commanded to attach. But, while this was a circumstance for the consideration of the jury in connection with the other evidence as to the true character of his conduct and course of procedure, yet, if they found that the estimated valuation was not wilfully made, it was not of itself proof of his alleged official misconduct. Merrill v. Curtis, 18 Maine, 272. Davis v. Webster, 59 N. H. 471.

It follows from what we have said, that the instructions to which the defendant excepted, that, if the defendant honestly attached and held the plaintiff's property for a larger amount than the writ specified, he acted at his peril and without authority, were erroneous.

Exceptions sustained.

JOHN K. MARTIN vs. JOSEPH I. STEWART & another.

Suffolk. March 9, 1911. — May 17, 1911.

Present: Knewlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Mechanic's Lien.

Under R. L. c. 197, § 6, it is only where labor was performed under an entire contract which included both labor and materials at an entire price, that the number of days of labor must be given in a statement filed to preserve a mechanic's lien for labor only. Where the lien is for the contract price agreed upon by the parties for labor only, it is not necessary to particularize by stating the number of days taken in its performance.

Petition, filed May 17, 1907, to establish a lien on a certain parcel of land and the building thereon on the corner of Geneva Avenue and Charles Street in that part of Boston called Dorchester, for carpenter work performed and furnished for such building under a contract between the petitioner and the respondent Stewart, who conveyed the property to the respondent Blanchard, trustee.

The case first was tried before Sanderson, J., upon an auditor's report. The judge, after certain findings by the jury, set aside the verdict on certain issues, granted a new trial, and reported the case for determination by this court. This court, in a decision reported in 204 Mass. 122, held, among other things, that the order for a new trial was proper and ordered that the case should stand for hearing in the Superior Court.

There was a new trial of the case before Bell, J., at which, in addition to the auditor's report, the petitioner testified at length and also introduced the testimony of the respondent Stewart. The respondent Blanchard, trustee, testified that he never knew what the terms were of the contract between the petitioner and the respondent Stewart and that he did not testify before the auditor. He also testified that at the time he took title to the property in January, 1907, he understood that all the work was finished, and that he never knew of any work being done by the petitioner after that. The change in the character of the evidence from that at the former trial is described in the opinion.

The respondent Blanchard asked the judge to make the following rulings:

- "1. Upon all the evidence in the case as a matter of law the petitioner is not entitled to recover.
- "2. The petitioner's statement is not sufficient to preserve a lien for materials.
 - "3. The petition is not sufficient to enforce a lien for materials.
- "4. The petitioner's contract with Stewart was an entire contract including both labor and materials at an entire price.
 - "5. There is a variance between the petition and the proof.
- "6. Upon all the evidence in the case as a matter of law the jury cannot answer the issue numbered three.
- "7. Upon all the evidence in the case as a matter of law the jury cannot answer the issue numbered five."

The judge with the assent of the petitioner made the rulings numbered two and three as requested. He refused to make any of the other rulings requested.

The jury were instructed properly as to computing interest upon any amount which they should find to be due and also as to certain items for \$100, \$125 and \$95.

The judge then submitted the case to the jury upon six issues, which with the answers of the jury to them were as follows:

- "1. Did the petitioner perform and furnish on the premises described in the petition the labor set forth in the petition?" The jury answered "Yes."
- "2. Is any amount due the petitioner for said labor?" The jury answered "Yes."
- "3. How much is due for such labor?" The jury answered '\$1,934.96."
- "4. At what time did the petitioner cease to perform and furnish labor on said premises?" The jury answered "April 25, 1907."
- "5. Did the petitioner within thirty days after he ceased to perform and furnish labor on the premises described in the petition file in the registry of deeds the statement required by law?" The jury answered "Yes."
- "6. Did the original contract under which \$3,600 was to be paid to the petitioner include the furnishing by the petitioner of the lumber for the stair carriages?" The jury answered "No."

The respondent Blanchard, trustee, alleged exceptions. It did not appear from the bill of exceptions that the judge made any order that the lien be established. W. R. Bigelow, for the respondent Blanchard, trustee. J. E. Crowley, for the petitioner, was not called upon.

BRALEY, J. It appeared in *Martin* v. *Stewart*, 204 Mass. 122, upon the auditor's report, which with a copy of the petitioner's statement of lien was all the evidence introduced at the trial, that the petitioner contracted with the respondent Stewart to perform all the carpenter work on the buildings except the laying of floors, and to furnish the lumber for the stair carriages for an entire price. The petitioner performed the contract, and did certain extra work, but as the statement of lien contained no reference to anything except labor, it was decided that no lien attached to the land, and the petition could not be maintained.

But the evidence at the second trial was materially different. It tended to show that the original contract, instead of being for labor and materials, was for labor only, and the jury found in answer to the sixth issue that the lumber for the stair carriages was not included. If the testimony was conflicting, the credibility of the witnesses was for the jury, and the positive statements of the petitioner, and of Stewart, who each testified as to the terms of the contract, cannot be disregarded even if inconsistent with their former testimony and the auditor's report. It was a question of fact which has been determined against the respondents, and the answer which settles the principal questions raised by the exceptions, having been warranted by the evidence, must stand.

The third issue called for an answer as to the amount due for labor, and, the statement of lien not having set forth the number of days, although giving the dates, the respondents asked for a ruling that this question could not properly be answered by the jury. But it is only where labor is performed or furnished under an entire contract, which includes both labor and materials, that the number of days must be specified in the statement. R. L. c. 197, § 6. If as in the present case the lien is for the contract price, for which the parties agreed that the work should be done, it is not necessary to particularize by stating the number of days taken in its performance. Patrick v. Smith, 120 Mass. 510, 513. We find no error of law at the trial.

Exceptions overruled.

ADELLA CLARK vs. HENRY E. BULLARD & another.

Suffolk. March 14, 1911. - May 17, 1911.

Present: Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.

False Representations. Fraud. Wagering Contracts. Release. Contract. Covenant.

In an action of tort for damages resulting from the plaintiff's relying on false and fraudulent representations by the defendants that a corporation, of which they were officers and agents and which was not a party to the action, was engaged in legitimate stock brokerage business, whereas it was "doing a gambling business under the management of the defendants," if it appears that the plaintiff because of the representations dealt with the corporation and suffered a loss, the defendants cannot rely in defense upon certain instruments under seal, to which the plaintiff and the corporation were the only parties, and in which, on the completion of certain specified transactions with the corporation, the plaintiff released and discharged it, "its principals, stockholders, officers, agents and servants, and each of them, therefrom, and also from any and all right of action, claim or demand under or by virtue of "St. 1890, c. 487, "or any act amendatory thereof or supplementary thereto, for any payment or deposit at any time heretofore made, either on the within contract or any other contract or transaction whatsoever," and covenanted "never to sue therefor them or either or any of them, or on account of any other cause of action, claim or demand whatsoever," because the defendants were not parties to the instruments and could maintain no action against the plaintiff on the covenants not to sue contained in them.

TORT for false and fraudulent representations that the Mutual Stock Company, of which the defendants were officers and agents, was engaged in the actual purchase and sale of stocks and commodities, whereby the plaintiff was induced to pay to it for legitimate transactions in stocks certain sums set out in a schedule annexed to the declaration, and suffered loss thereby, the declaration alleging that the Mutual Stock Company was not engaged in the actual purchase and sale of stocks and commodities but was "doing a gambling business under the management and control of the defendants." Writ in the Municipal Court of the City of Boston dated March 6, 1906.

On appeal to the Superior Court, the case was tried before Bell, J. In defense the defendants offered five releases, which are described in the opinion, and as to which the presiding judge, when they were offered, ruled as follows: "I am going to make a ruling here for the purpose of settling this matter. I might as well make it broad enough. Our statute, not for the benefit of

the stockholders, nor for the benefit of the particular person who deals with this company, but for the purpose of preventing and discouraging this business as a matter of public policy, passed certain laws. If these [referring to the alleged releases] were given for the purpose of escaping and evading these laws, I rule they were void."

The releases were excluded, subject to exceptions by the defendants.

The jury found for the plaintiff in the sum of \$824.96; and the defendants alleged exceptions.

The case was submitted on briefs.

F. H. Noyes, for the defendants.

G. H. Stebbins, O. Storer & C. E. Burbank, for the plaintiff.

MORTON, J. This is an action of tort to recover of the defendants for certain alleged false representations made by them in regard to the nature of the business carried on by the Mutual Stock Company, of which the defendants were officers and agents, and thereby inducing the plaintiff to enter into various transactions and dealings with that company to her detriment. There was a verdict for the plaintiff and the case is here on the defendants' exceptions.

The defendants rely on certain releases given by the plaintiff to the Mutual Stock Company, wherein, in consideration of the sums therein recited to have been received by her from the Mutual Stock Company, "in full for all payments under any and all contracts and transactions 'closed' to this date," she releases and discharges "the said Mutual Stock Company, its principals, stockholders, officers, agents and servants, and each of them, therefrom, and also from any and all right of action, claim or demand under or by virtue of chapter 437 of the Acts of the Commonwealth of Massachusetts for the year 1890, or any act amendatory thereof or supplementary thereto, for any payment or deposit at any time heretofore made, either on the within contract or any other contract or transaction whatsoever, and I covenant never to sue therefor them or either or any of them, or on account of any other cause of action, claim or demand whatsoever."

The action, it is to be observed, is not for any claim or demand arising under and by virtue of St. 1890, c. 437, now R. L.

c. 99, or any acts in amendment thereof or supplementary thereto, but for fraudulent representations alleged to have been made by the defendants in regard to the nature of the business carried on by the Mutual Stock Company of which the defendants were and are officers and agents. So much of the releases as relate to such claims or demands was and is therefore manifestly inapplicable to the case before the court. It is also to be observed that the releases relied on and the covenants not to sue contained therein are contracts not between the plaintiff and the defendants but between the plaintiff and the Mutual Stock Company. The defendants are not parties to the contracts contained in the releases or to the covenants not to sue. It is plain, we think, that the defendants could maintain no action against the plaintiff for a breach of the covenant not to sue contained in the releases. for the reason that the covenant is not made with them but with the Mutual Stock Company, and no part of the consideration moves from them. Saunders v. Saunders, 154 Mass. 337. Clare v. Hatch, 180 Mass, 194.

Moreover the releases are under seal, and in regard to them "the law," as said in Saunders v. Saunders, supra, "has always been that only those who were parties to them could sue upon them." If the defendants could not maintain an action for breach of the covenant not to sue, we do not see how they can avail themselves of it by way of defense or to prevent circuity of action as a bar to the present suit. Perkins v. Gilman, 8 Pick. 229. The reason that they are not parties to the covenant and none of the consideration moves from them is as applicable in one case as in the other. Even if it be assumed in favor of the defendants that if they were parties to them the releases would operate as a bar to the present action, for the reasons stated we think that they must be regarded as inoperative so far as these defendants are concerned.

If the releases cannot be pleaded by the defendants as a bar to the present action for the reasons stated, it is immaterial whether they would also be void, as ruled by the presiding judge, if they were given for the purpose of escaping and evading the statute in regard to wagering contracts (R. L. c. 99), as to which see Wall v. Metropolitan Stock Exchange, 168 Mass. 282.

Exceptions overruled.



HABRY W. WILLIS vs. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. March 14, 15, 1911. — May 17, 1911.

Present: Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.

Negligence, Street railway, Reckless and wilful misconduct.

In an action against a street railway corporation for personal injuries from being run into by an electric car of the defendant, it appeared that the accident took place between 12.80 and 1 P. M. on a pleasant day in June upon the main street of a small country village along which cars of the defendant were accustomed to run "pretty fast," that the car was going down a hill toward an intersecting street, that, when about seven hundred feet from the cross street, the motorman had seen the plaintiff proceeding from the main street into the intersecting street and had lost sight of him, that the motorman kept his eyes and attention on the track before him but did not sound a whistle or ring a gong, although the car was provided with both and a rule of the defendant required him to do so in approaching a cross street, that when about one hundred feet from the cross street he saw the plaintiff returning and about to cross the tracks and that, although he at once applied air brakes and reversed his power, he was unable to stop the car until it had struck the plaintiff, had hurled him forty feet and had continued on its course over a level track with the air brakes set for about two hundred and ten feet. There was no evidence that the plaintiff was in the exercise of due care. Held, that the excessive speed of the car and the failure to sound the whistle or gong were not evidence of such wilful misconduct and such wanton and reckless disregard of the probable harmful consequences of his acts on the part of the motorman as to entitle the plaintiff to go to the jury without evidence of due care on his part.

TORT for personal injuries from being run into by an electric car of the defendant between twelve and one o'clock in the afternoon of June 4, 1907, at or near the crossing of Main Street and Park Street in North Reading. Writ dated October 8, 1907.

In the Superior Court the case was tried before *Hardy*, J. An exception by the defendant to a refusal of the presiding judge to rule that there was no evidence for the consideration of the jury on the first count of the declaration was sustained by this court in a decision reported in 202 Mass. 463.

The second count of the declaration, to which alone these exceptions relate, was as follows:

"And the plaintiff says that the defendant is a street railway corporation and runs its cars over the State highway, so called,

in North Reading aforesaid, and on June 4, 1907, the plaintiff being then and there a pedestrian on the public highway, was injured . . . by the gross recklessness and culpable negligence of the defendant's servant in charge of one of its cars, said negligence consisting in the reckless and wilful overspeeding of said car combined at the same time with a wilful neglect to sound a warning bell or whistle and a wilful neglect to maintain a watch or lookout when approaching the intersecting public street from which the plaintiff was passing into said State highway, the view of an approaching car from said intersecting street being obscured and shut off by trees and foliage."

On the question of whether the conduct of the motorman of the car amounted to such wilful misconduct and wanton and reckless disregard of the probable harmful consequences of his acts as to render the defendant liable although the plaintiff was not in the exercise of due care, which is the only question raised by these exceptions, there was evidence tending to show that the motorman, as the car proceeded on Main Street down a hill approaching Park Street, permitted it to go very fast; that when seven hundred feet from the crossing of the two streets the motorman had seen the plaintiff driving his horses down Main Street and disappearing into Park Street, and that the motorman did not sound any whistle or gong as he approached Park Street although the rules of the company required him to do so. The motorman testified that he considered the corner "a rather dangerous corner." When the motorman was about one hundred feet from the place of the accident, he saw the plaintiff returning and again about to cross the track, and tried to stop the car with the use of the air brake and the reverse, but was unable to do so until after the horses had crossed the track, the car had struck the plaintiff, had hurled him about forty feet and then had continued on its course with the air brakes set for about two hundred and ten feet over a level track.

Other facts are stated in the opinion.

At the close of the evidence, besides making the ruling permitting the first count of the declaration to go to the jury, an exception to which by the defendant was sustained, as previously stated, the presiding judge ordered a verdict for the defendant on the second count; and the plaintiff alleged exceptions.

J. E. Hannigan, for the plaintiff.

E. P. Saltonetall, (C. W. Blood with him,) for the defendant. MORTON, J. This is an action of tort for personal injuries. There are two counts in the declaration. The first alleges that the plaintiff was in the exercise of due care and that the defendant's servants were negligent. The second count contains no averment of the plaintiff's due care but alleges, as the bill of exceptions states, "gross negligence" on the part of the servants of the defendant. The case was before this court in 202 Mass. 463, on the defendant's exceptions to the refusal of the presiding judge to rule that on all the evidence the plaintiff could not recover. At that trial the presiding judge directed a verdict for the defendant on the second count, but refused to rule that the plaintiff could not recover on the other count. The plaintiff excepted to this ruling, but as the jury returned a verdict for him on the first count it did not then become necessary for him to prosecute his exceptions to the ruling in regard to the second count. The defendant's exceptions were sustained on the ground that the plaintiff was not in the exercise of due care. This rendered it necessary for the plaintiff to prosecute his exceptions in regard to the ruling on the second count and those are the exceptions which are now before us. The question is whether the judge was wrong in ruling that there was no evidence of negligence under the second count,

We think that the ruling was right. The negligence that must be shown in order to warrant a verdict in his favor where the plaintiff was not in the exercise of due care differs not merely in degree but in kind from ordinary negligence. Banks v. Braman, 188 Mass. 367. Fitzmaurice v. New York, New Haven, & Hartford Railroad, 192 Mass. 159, 162, note. In order to warrant a verdict against the defendant, the plaintiff himself not being in the exercise of due care, there must be evidence tending to show conduct on the part of the motorman which was wilful and which he knew or ought to have known would tend to cause injury, and which was accompanied by a wanton and reckless disregard of the probable harmful consequences to others. Banks v. Braman, supra.

The evidence falls far short, it seems to us, of establishing such conduct. The accident occurred in broad daylight, be-

tween half past twelve and one o'clock on June 4, 1907. day was pleasant. There was nothing unusual in the weather. The road was straight for some seventeen hundred feet from the place of the accident, in the direction in which the car was coming. The scene of the accident was the main street of a small country village, with such travel upon it and upon the road which crossed it as naturally might be expected. If it was not common, it was, at least, not unusual for cars to run "pretty fast," as the plaintiff testified, along the piece of road where the accident occurred. There was nothing to show that the attention of the motorman was diverted from his car or that he was not attending strictly to the running of it although he may have been driving it considerably faster than he ought to have driven it. Until he got to Park Street there was for quite a distance no cross street. From a point several hundred feet away he had, as he testified, seen the plaintiff cross the road and had no reason to suppose that he would return, or that if he did, he or anybody else coming out of Park Street would not take proper care to avoid an accident. There was nothing in the time of day or the state of the weather or the amount of travel to call for unusual and extraordinary care on the part of the motorman. Under these circumstances we do not think that his failure to sound the gong or blow the whistle and the excessive speed at which there was evidence to show that the car was going was sufficient to establish negligence of the sort which the plaintiff was required to show in order to recover. See Moran v. Milford & Uxbridge Street Railway, 198 Mass. 52. The case differs from Ingraham v. Boston & Northern Street Railway, 207 Mass. 451, and Vincent v. Norton of Taunton Street Railway, 180 Mass. 104, and other cases relied on by the plaintiff.

Exceptions overruled.

MANUFACTURERS' BOTTLE COMPANY vs. TAYLOR-STITES GLASS COMPANY.

Suffolk. November 18, 1910. — May 18, 1911.

Present: Knowlton, C. J., Morton, Loring, Sheldon, & Rugg, JJ.

Practice, Civil, Plea in abatement, Set-off. Lis Pendens.

- In an action of contract the pendency of another action for the same cause by the plaintiff against the defendant, in the form of a declaration in set-off filed by him in a previous action, is as good a reason for an answer in abatement as is the pendency of an original and independent suit for the same cause of action.
- Review by Knowlton, C. J., of decisions of this and of other courts with regard to what disposition should be made of pleas in abatement founded upon the pendency of another action for the same cause, where, before action upon the plea was called for, the previous action was disposed of.
- It seems, that it is more equitable, where a second action is brought for a cause that was made the foundation of a former action which is defective in some essential particular, to allow the plaintiff to discontinue the former action upon proper terms and to proceed with the later one, rather than to order an abatement of the last action and to compel him to begin anew after the termination of the first.
- A defendant in an action filed a declaration in set-off, to which the plaintiff demurred. Later, and while the former action was pending, the defendant brought a separate action against the plaintiff for the same cause as that alleged in the declaration in set-off and in the second action the defendant filed a plea in abatement, based on the pendency of the claim in set-off. A determination of the plea was postponed until a determination of the issue raised by the demurrer to the declaration in set-off in the first action. That demurrer being sustained by this court on the ground that the claim alleged in the declaration in set-off was unliquidated, the plea in abatement in the second suit was overruled. Held, that the plea was overruled properly; although, it was intimated, that a better course to have adopted when action upon the plea in abatement first was asked for might have been to have ordered an abatement unless the declaration in set-off was abandoned, that is, to have compelled an election between the two actions.

Knowlton, C. J. On July 12, 1906, the defendant in this case brought in the Superior Court an action against the present plaintiff, to which the defendant in that case filed a declaration in set-off. To this declaration in set-off a demurrer was filed, and litigation continued upon the issue raised by these pleadings until a decision was rendered and a rescript sent by this court in favor of the plaintiff in that suit, on February 25, 1909, which decision appears in Taylor-Stites Glass Co. v. Manufacturers' Vol. 208.

Bottle Co. 201 Mass. 123.* On December 19, 1907, this suit was brought upon the same cause of action that was set out in the declaration in set-off in the former suit, and on January 21, 1908, an answer in abatement was filed, setting up the bringing of the former suit, and the declaration in set-off therein for the same cause of action as that which is the foundation of the present suit, and that the former action was still pending. This answer was sustained in the Municipal Court; but upon an appeal to the Superior Court the answer, after a hearing, was ordered to stand until the demurrer in the former suit should be disposed of. After the entry of judgment in accordance with the rescript in the former suit, the answer in abatement in the 'present case was brought up again and overruled.† The case is now before us upon an exception to the order overruling the answer in abatement.

The declaration in set-off, filed under the provisions of the R. L. c. 174, is a statement of an action in favor of the defendant for the amount claimed in the declaration, and in substance and effect it is, in most particulars, like the bringing of an independent suit to recover the sum alleged to be due. Looney v. Looney, 116 Mass. 283, 286. Green v. Sanborn, 150 Mass. 454. Squier v. Barnes, 193 Mass. 21, 24. The pendency of an action by a defendant, in the form of a declaration in set-off, is as good a reason for an answer in abatement to a subsequent action upon the same claim, as is the pendency of an original and independent suit for the same cause of action. This has been held in different cases. It rests on sound principles, and we know of no decision to the contrary. Pennsylvania Railroad v. Davenport, 154 Penn. St. 111. Demond v. Crary, 1 Fed. Rep. 480. Woody v. Jordan, 69 N. C. 189, 197. Banigan v. Woonsocket Rubber Co. 22 R. I. 93. Snodgrass v. Smith, 13 Ind. 393. Lock v. Miller, 8 Stew. & P. 13.

The question arises whether the facts that the cause of action was one that could not be enforced under a declaration in set-off and that the first suit had been ended before the entry of the

[•] It was decided that the claim stated in the declaration in set-off, being a claim for damages which were unliquidated, could not be maintained in set-off.

[†] By Hitchcock, J.

order overruling the answer in abatement, to which exception was taken, justified the decision of the Superior Court.

At common law and in the early practice of the courts in this country, the doctrine that one should not be vexed by the pendency of two actions for the same cause, at the same time, was enforced with great strictness. The subject was fully and ably considered by Chief Justice Parsons in Commonwealth v. Churchill, 5 Mass. 174, and it was held to be sufficient to abate a writ, that a former action for the same cause was pending when the second suit was begun, even if it was discontinued or otherwise disposed of before the plea in abatement was filed, It was implied, if not distinctly decided, that if the second writ was for the same cause of action, the suit must be deemed vexatious if it was begun while the former was pending, without reference to the reasons for bringing it. This case has been followed and the rule applied with strictness in some other courts. Gamsby v. Ray, 52 N. H. 513. Demond v. Crary, 1 Fed. Rep. 480. Le Clerc v. Wood, 2 Pinney, 37. Frogg v. Long, 3 Dana, 157. Merriam v. Baker, 9 Minn. 40, 44. Orman v. Lane, 130 Ala. 805.

But later adjudications, a part of them by some of the same courts whose decisions are cited above, are more liberal in favor of plaintiffs who have brought a second suit during the pendency of the first, for the same cause of action, for the purpose of curing a defect in the former proceedings, or who have discontinued the first action before the decision of the court upon the plea in abatement in the second action. Cases permitting an inquiry as to whether the second suit was justified, by reason of defects or peculiar conditions in the former one, are the following: Quinebaug Bank v. Tarbox, 20 Conn. 510. Downer v. Garland, 21 Vt. 362. Blackwood v. Brown, 84 Mich. 4. State v. Dougherty, Griffin v. Levee Commissioners, 71 Miss. 767. 45 Mo. 294. Norfolk & Western Railroad v. Nunnally, 88 Va. 546. Hoskins, 15 Ga. 270. Gilmore v. Georgia Railroad & Banking Co. 98 Ga. 482. National Express of Transportation Co. v. Burdette, 7 App. Cas. (D. C.) 551. Phillips v. Quick, 68 Ill. 324. Byne v. Byne, 1 Rich. (S. C.) 438. Langham v. Thomason, 5 Texas, 127. Cases stating the doctrine that a plea in abatement, founded

on the pendency of a former action for the same cause, may

be avoided by the discontinuance or other termination of the former action after the plea is filed are Banigan v. Woonsocket Rubber Co. 22 R. I. 93; Wilson v. Milliken, 103 Ky. 165; Warder v. Henry, 117 Mo. 530; Page v. Mitchell, 37 Minn. 868; Nichols v. State Bank, 45 Minn. 102; Moorman v. Gibbs, 75 Iowa, 537; Trawick v. Martin Brown Co. 74 Texas, 522; Grider v. Apperson Co. 32 Ark. 832; Chamberlain v. Eckert, 2 Biss. 124; Moore v. Hopkins, 83 Cal. 270; Dyer v. Scalmanini, 69 Cal. 687; Porter v. Kingsbury, 77 N. Y. 164, 167; Crossman v. Universal Rubber Co. 127 N. Y. 84, 39; Toland v. Tichenor, 3 Rawle, 320, 824; Findlay v. Keim, 62 Penn. St. 112, 117, 118; Winner v. Kuehn, 97 Wis. 894, 897, 398; Farris v. Hayes, 9 Ore. 81, 87.

There is similar liberality to plaintiffs in such cases under the present rules of practice in England. See *Haigh* v. *Paris*, 16 M. & W. 144; *McHenry* v. *Lewis*, 22 Ch. D. 397.

We are of opinion that it is more equitable, where a second action is brought for a cause that was made the foundation of a former suit which is defective in some essential particular, to allow the plaintiff to discontinue the former suit upon proper terms, and proceed with the later one, rather than to order an abatement of the last action, and compel him to begin anew after the termination of the first suit.

In the present case it appears that the claim could not be maintained under the declaration in set-off, because it was unliquidated. Perhaps it would have been better to have compelled the plaintiff to elect between the two actions when the answer in abatement first came up for a hearing in the Superior Court, by an order for an abatement, unless the declaration in set-off was abandoned. But we have no occasion to consider this question, as the exception is only to the order made at the last hearing.

Exceptions overruled.

F. G. Bauer, (J. M. Fowler with him,) for the defendant. W. Charak, for the plaintiff.

WILLIAM S. McMahon vs. Charles S. RICE.

Suffolk. March 7, 1911. — May 18, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Negligence, Employer's liability.

At the trial of an action by a carpenter against his employer for personal injuries, it appeared that the plaintiff had been a carpenter for thirty years and, when injured, was assisting in the remodelling of a building, which was being done under the defendant's personal supervision. In the course of the work certain brick walls had to be taken down and the plaintiff had helped to put up a fence around a sidewalk adjacent to the building, as to which he testified that he did not "know what it was for unless it was to keep people out and from getting hurt from anything falling from the building." At a later stage of the work the plaintiff was directed to move a temporary brace which was supporting the second floor of the building and to put in a stronger one and, while so doing, was struck on the head by a brick which had slipped from the control of a fellow workman who was helping to tear down the brick wall. There was no evidence which tended to show that the methods adopted by the defendant in tearing down the wall and disposing of the brick were unusual or improper. Held, that the defendant had a right to assume that the plaintiff could and would take care of himself so far as respected the usual and obvious dangers of employment, and that he needed no instruction and warning; and that therefore, if the plaintiff's injury was caused by negligence of any one, it was by negligence of a fellow servant, for which the defendant was not liable.

TORT for personal injuries, received while the plaintiff was at work for the defendant in remodelling the two lower stories of a brick building numbered 15 on Cornhill, in Boston, and extending through to Brattle Street. Writ dated November 15, 1907.

In the Superior Court the case was tried before *Bond*, J. The facts are stated in the opinion. At the close of the plaintiff's case, the defendant rested and the judge ordered a verdict for the defendant. The plaintiff alleged exceptions, which, after the death of *Bond*, J., were allowed by *Richardson*, J.

W. H. Brown, (J. H. Coakley with him,) for the plaintiff.

W. H. Hitchcock, for the defendant.

Hammond, J. While the plaintiff was at work for the defendant in remodelling the two lower stories of a brick building, he was directed by the defendant, who personally superintended the work, to move a temporary brace which was supporting the second floor, and to put in a stronger one. As soon as he got to the place in-

dicated and as he was taking hold of the brace, he was struck on the head by a brick which had slipped from the control of a fellow workman who was engaged in tearing down a part of the wall upon the Brattle Street side of the building. The plaintiff began to work for the defendant on the morning of the day of the accident, which occurred at about one o'clock P. M. He testified that he knew the building was going to be remodelled; that he did not notice during the forenoon that any bricks had been taken from the wall, although when he came back from dinner he did notice an opening in it about twenty feet from the ground, and that some of the wall was down, but he "couldn't tell what they were doing"; that he saw no staging on the Brattle Street side and saw no men at work about the wall, and that he did not stop to think "where the bricks had gone from the wall."

One Rudd testified as follows as to the way in which the work of tearing down the wall was carried on: "The wall had been taken down, to some extent at least, before the day of the accident. The wall was taken down by men employed by Mr. Rice and they chopped and loosened the brick with chisels and were supposed to chuck them down on the outside. There was a staging on the outside of the wall. The workmen cut at the brick with hammer and chisel, loosened them up and chucked them down, they took them in their hands and threw them down on this enclosed sidewalk. On the morning of the accident there were a good many brick in this enclosure. On the morning of the accident I couldn't tell how much of the wall was taken down. Some of it was down. The men were not supposed to throw brick on the inside of the building. I didn't see any thrown there." He described the circumstances of the accident as follows: "I was on the first floor and McMahon [the plaintiff] went below where I couldn't see him. . . . Some one said 'Look out' and I looked up just in time to see the mason making a grab for those bricks. There was no part of the wall fell except this bunch of bricks which the workmen had just dislodged. . . . When I heard the words 'Look out' it was then I looked and saw the brick falling down. The workman was knocking the brick off not directly above the plaintiff but somewhat to one side. Three or four feet to one side, but when he



grabbed the brick he shoved it and of course it went off somewhat sideways." This witness further testified that "taking down walls by taking out the bricks and throwing them down was about the only way you can take them down, the only way I ever saw it done."

There was no evidence that would justify a jury in coming to the conclusion that the way adopted was unusual or improper. But the plaintiff contends that the defendant was negligent in ordering him to work upon the brace without proper precautions to protect him. He invokes the familiar rule that the master owes to his servant the duty of proper protection and to inform him of danger.

The building does not seem to have been a large one. two lower stories were to be remodelled, a work which of necessity required some changes. The plaintiff had been a carpenter for thirty years and must be assumed to have known what kind of work was going on and how it was being done. Indeed he testified that the first thing he did on the building was to help put up a fence around the sidewalk on Brattle Street, that he did not "know what it was for unless it was to keep people out and from getting hurt from anything falling from the building." Whether or not he was so blind or inattentive, as he testified, to the manner in which the work, especially the demolition of the wall, was going on, it is certain that everything was before his eyes, and that the defendant had the right to assume that an experienced carpenter like the plaintiff could and would properly take care of himself so far as respected the usual and obvious dangers of the employment, and that he needed no instruction. Independent of any question of the assumption of risk by the plaintiff (as to which see Marshall v. Norcross, 191 Mass. 568), it cannot be said that there was any negligence on the part of the defendant in failing to inform the plaintiff of the possibility that a brick might escape from the control of the men at work on the wall. If there was any negligence it was that of the fellow servant who dropped the brick. For such negligence the defendant is not answerable. See Flynn v. Campbell, 160 Mass. 128; Fay v. Wilmarth, 183 Mass. 71; Boisvert v. Ward, 199 Mass. 594.

Exceptions overruled.

GEORGE H. BROWN vs. JOHN H. HARRINGTON.

Middlesex. March 8, 1911. — May 18, 1911.

Present: Knowlton, C. J., Hammond, Brally, Sheldon, & Rugg, JJ.

Libel and Slander.

An entire page of a newspaper was covered with the following, with regard to the mayor of the city in which the newspaper was published, who was a candidate for re-election: A cartoon or caricature labelled "City Farm" and showing inmates emaciated, in various attitudes of dejection and despair, some sitting at a dining table and others rising in disgust or protest as a woman approached bearing a tray containing a small amount of food and a teapot. Toward the tray hands pointed from the words, "Poor food," "Rancid butter," "Shadow tea"; while just beside and behind the woman was depicted a large receptacle labelled, "Forty gallons of water to a pound of fifteen-cent tea." At the top of the page above the picture were the words in very large type, "Saving on the city's poor is the meanest kind of economy"; while underneath, in a little smaller type, were the words, "It is no crime to be poor, but it is wrong to stint the poor and the unfortunate." Then followed this language in large print: "Mayor Brown forced a competent and humane board of charity out of office because it would not do his bidding, and he put in the present charity board, which has been cognizant of this outrage upon the poor and unfortunate inmates of our city farm. In the name of humanity and public decency, let us go to the polls tomorrow, like men, and repudiate the mayor who has been solely responsible for this blot upon the fair name of our city." In an action by the mayor against the publisher of the newspaper, the foregoing facts were alleged in the declaration, and there was evidence to prove them all. Held, that the publication was actionable as a libel, and that the case was for the jury.

TORT for a libel, alleged to have been published in the Lowell Sun of December 13, 1909, as described in the opinion. Writ dated December 13, 1909.

The defendant demurred to the declaration for the following reasons:

- "1. That the statements contained in the alleged libellous article, taken according to their natural import, contain nothing defamatory of the plaintiff.
- "2. That if the said alleged libel contains any defamatory statements, they were not made of and concerning the plaintiff in this action.
- "8. That the said alleged libellous article shows on its face that it was a criticism of a public officer, made at a time when he was seeking re-election, and that it was therefore privileged.

"4. That said alleged libellous article charges the plaintiff, as mayor of the city of Lowell, only with removing a competent board of officers and putting in another board, which as mayor of said city he had a right to do, and does not charge that the plaintiff had any improper purpose in so doing, nor that he had any knowledge of the manner in which the charity board treated the poor of Lowell."

The demurrer was heard by *Hardy*, J., and was overruled; and the defendant appealed.

The case was tried before Fox, J. The facts are stated in the opinion. The jury found for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

F. W. Qua, for the defendant.

J. G. Hill, for the plaintiff.

Knowlton, C. J. This is an action of tort for a libel published in a newspaper in Lowell. The questions before us arise on the defendant's appeal from an order overruling a demurrer to the declaration, and on exceptions to the refusal to order a verdict for the defendant at the close of the evidence, and a refusal to give certain instructions requested. The questions upon the appeal and the refusal to order a verdict for the defendant, are substantially the same, and the questions upon the other requests are kindred in character.

The publication was plainly defamatory. It covered an entire page of the newspaper and consisted of a cartoon or caricature labelled "City Farm" and showing inmates emaciated, in various attitudes of dejection and despair, some sitting at a dining table and others rising in disgust or protest as a woman approached bearing a tray containing a small amount of food and a teapot. Towards the tray hands point from the words, "Poor food," "Rancid butter," "Shadow tea"; while just beside and behind the woman is depicted a large receptacle labelled. "Forty gallons of water to a pound of fifteen-cent tea." At the top of the page above the picture were the words in very large type, "Saving on the city's poor is the meanest kind of economy"; while underneath, in a little smaller type, were the words, "It is no crime to be poor, but it is wrong to stint the poor and the unfortunate." Then followed this language in large print: "Mayor Brown forced a competent and humane board of charity



out of office because it would not do his bidding, and he put in the present charity board, which has been cognizant of this outrage upon the poor and unfortunate inmates of our city farm. In the name of humanity and public decency, let us go to the polls tomorrow, like men, and repudiate the mayor who has been solely responsible for this blot upon the fair name of our city." The plaintiff was then the mayor of the city and was a candidate for re-election.

It needs no argument to show that this publication would have a tendency to hold the plaintiff up to ridicule and contempt, and to inflict a serious injury upon his reputation. It represented the mayor as officially and personally responsible for a great wrong upon the dependent poor of the city of Lowell, and for bringing the city into disrepute for a failure to support its paupers properly. The declaration contains sufficient averments of the publication of the libel, and it is plain that the demurrer was rightly overruled. The evidence tended to prove all the allegations of the declaration, and a verdict for the defendant could not have been directed without doing violence to the law.

The defendant set up the truth as a justification, and relied upon his qualified privilege, founded on the fact that the plaintiff was a public officer and a candidate for re-election. The jury were given full and proper instructions covering both of these defenses. See Commonwealth v. Pratt, ante, 553. The special requests for instructions relied upon, need not be considered in detail. They selected different parts of the language of the publication from the rest of it and asked for an instruction as to each part, that if it was given a certain interpretation by the jury, a certain result would follow, which would leave the defendant without liability on account of it. Most, if not all of these suggested interpretations, were such as could not properly be given by the jury. Moreover, the judge was not called upon to select certain portions of the evidence bearing upon a certain charge, and to give instructions as to the effect of each portion taken by itself alone. Hicks v. New York, New Haven, & Hartford Railroad, 164 Mass. 424.

· Order affirmed; exceptions overruled.

SUPPLEMENT.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

- It is within the constitutional power of the Legislature to permit a city or town, which owns and occupies for municipal purposes the land and buildings on opposite sides of a public street or highway, and also owns the fee of the land over which the street or highway is laid out and constructed, to erect a bridge or structure above such street or highway connecting the two buildings. But where the land over which the street or highway is laid out and constructed belongs to a private owner, such a bridge or structure can be authorized to be built only when the municipal purposes for which the buildings are used are public purposes and then only with the consent of such private owner or upon paying him compensation.
- It is within the constitutional power of the Legislature to confer upon a city or town the power to grant permits to private owners of the land and buildings on opposite sides of a public street or highway, who also own the fee of the land over which the street or highway is laid out and constructed, to erect a bridge or structure above such street or highway connecting the two buildings.
- It is within the constitutional power of the Legislature, in enacting a law conferring upon a city or town the power to grant permits or licenses to private individuals, who own the land and buildings on opposite sides of a public street and the fee of the land under the street, to erect bridges over such public street connecting the buildings on the two sides of the street, to provide that such licenses shall be revocable at any time by the city or town and that the city or town shall charge a rent for such licenses.
- The owner of real estate abutting on a public street has the right to have the street open for light and air so long as there are no uses affecting his enjoyment of light and air to which the public desire to put the street under their easement for purposes of travel and communication. If the Legislature in behalf of the public impose an additional burden on the property of the abutter for a different kind of public use, which will interfere with his enjoyment of light and air by the erection of structures upon or over his land within the limits of the street, he is entitled to compensation.
- An owner of real estate, in the absence of an express grant or covenant to that effect, has no right to have the adjacent land remain open for the admission of light and air. Accordingly, where the owner of such adjacent land has consented to the erection upon or over his land of a bridge or structure above and across a street connecting opposite buildings, this obstruction of light and air in the right of such consenting owner as well as with authority from the Legislature impairs no property right of the owners of the adjacent lands.

THE following order was passed by the House of Representatives on April 4, 1911, and on April 6, 1911, was transmitted to the Justices of the Supreme Judicial Court. On April 17, 1911, the Justices returned the answer which is subjoined.

ORDERED, that the opinion of the Justices of the Supreme Judicial Court be required upon the following questions:

First, Is it within the constitutional power of the Legislature to permit the city of Boston, or any city or town of the Commonwealth, to erect a bridge or structure across a public street or highway connecting premises owned or occupied for municipal purposes on opposite sides of the public street or highway?

Second, Is it within the constitutional power of the Legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street?

Third, Is it within the constitutional power of the Legislature to enact a law conferring upon a city or town in this Commonwealth the power to grant permits or licenses to bridge public streets connecting premises on opposite sides which will be revocable at any time at the action of the city or town government, and for which a rent will be charged payable to the city or town in which the permit or license may be granted?

Fourth, Is it any restriction of the constitutional right of the owner of premises abutting on a public street or highway in a city or town of this Commonwealth to have the light and air in the public street obstructed by the erection of a structure connecting premises on the opposite sides of the street, provided there is provision made for compensation to persons suffering any damage thereby?

Fifth, Is the right of an owner of property abutting on the public street or highway where he owns the fee to the middle of the street or way limited solely to his right upon and over the surface of the street, or does it include also rights to light and air above the surface of the street, and the right to have the street for its entire length open from the street surface up to the sky?

Sixth, What rights, if any, do the abutting owners of public streets or ways enjoy other than the rights general to the public?

Accompanying the order were copies of two bills pending in the House of Representatives, one of them, House Bill No. 451, being entitled "An Act to authorize the Bridging of Mason Street in the City of Boston," and the other, House Bill No. 817, being entitled "An Act to authorize the Construction of a Bridge over Avon Street in the City of Boston."

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, respectfully answer the questions propounded by the order of April 4, 1911, a copy of which is hereto annexed, as follows:

When a public street or highway is laid out and constructed under the general laws of this Commonwealth, the public acquires an easement in the land, which includes a right to occupy it for every kind of travel and communication of persons, and every movement of property, that is reasonable and proper in the use of a public street. Sears v. Crocker, 184 Mass. 586. Subject to this paramount right, the owner of the fee retains his ownership of every valuable interest in the land, and he may use it in any way that does not interfere with the right of the public to the enjoyment of its easement.

The Legislature represents the public, and at any time it may enlarge or limit public rights thus acquired, having due regard to private rights of property secured by the Constitution to all the people. New England Telephone & Telegraph Co. v. Boston Terminal Co. 182 Mass. 897, 400. So far as the rights of the public in the street or way are concerned, the Legislature can do anything referred to in any of the questions, if the proposed legislation seems reasonable and proper.

So far as the abutters are concerned, the Legislature, without their consent, can do or authorize nothing that takes away or impairs any valuable right in their property, unless the taking is for a public use, with compensation for that which is taken.

We infer that the premises on opposite sides of the street, referred to in the first question, are owned by the city or town, and that the ownership includes the fee of the street. Under this assumption, the answer to this question is in the affirmative.

If, on the other hand, the land upon or over which the bridge is to be built belongs to a private person, the bridge can be built without his consent only by paying him compensation, and only if the municipal purposes referred to are public purposes, as distinguished from an existing or intended use in a private business.

To the second question the answer is, Yes, if the private individuals own all the land upon or over which the structures are to be erected.

To the third, we answer Yes, upon the same hypothesis. A regulation making licenses revocable is not necessarily unreasonable; and the Legislature may require the payment of a rent to the city or town for the slight impairment or limitation of the previously existing public rights. Postal Telegraph Cable Co. v. Chicopee, 207 Mass. 341.

As against the easement acquired by the public for purposes of travel and communication, an abutting owner has the right to have the street open for light and air, so long as there are no uses affecting his enjoyment of light and air to which the public desires to put the street, under the easement which it has acquired for purposes of travel and communication. If the Legislature should authorize the imposition of an additional burden upon his property for a different kind of public use which would interfere with his enjoyment of light and air, by erecting structures upon or over his land within the limits of the street, he would be entitled to compensation.

As against an adjoining landowner, one has no right to have the adjacent premises remain open for the admission of light and air. In the cases referred to in the first three questions, we assume that the owners of abutting land, upon or over which the structure would be erected, would desire the erection and would consent to it. It would, therefore, be made in their right, as well as with authority from the Legislature to make an encroachment upon the previously existing public right. The existence of this private right of the owner of the fee of the land over which the structure would be erected would preclude the owners of adjacent lands from having damage for an obstruction of light and air, possibly affecting their property abutting on other adjacent parts of the street.

We think these statements sufficiently answer the fourth, fifth and sixth questions.

Mr. Justice Loring asks to be excused from answering the questions by reason of pecuniary interest in a lot near the place referred to in one of the pending bills.

MARGUS P. KNOWLTON.
JAMES M. MOBTON.
JOHN W. HAMMOND.
HENBY K. BRALEY.
HENBY N. SHELDON.
ARTHUB PRENTICE RUGG.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

A statute making it a criminal offense to engage in any gift enterprise, and providing that a person who in any manner holds out a promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any article or thing shall be deemed to be engaging in a gift enterprise within the meaning of the statute, would be unconstitutional.

THE following order was passed by the House of Representatives on April 4, 1911, and on April 6, 1911, was transmitted to the Justices of the Supreme Judicial Court. On April 17, 1911, the Justices returned the answer which is subjoined.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law, namely: Would the provisions of the bill now pending in the General Court, which prohibits gift enterprises, being House Bill No. 1097, a copy of which is transmitted herewith, be constitutional if enacted?

HOUSE BILL No. 1097.

An Act Prohibiting Gift Enterprises.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Whoever shall in any manner engage in any gift enterprise business shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than aix months.

Section 2. Every person who shall either as principal, agent, attorney or employee sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement with a promise, expressed or implied, to give or bestow, or in any manner hold out a promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character or for any purpose whatever shall be deemed to be engaging in a gift enterprise within the terms and meaning of section one.

Section 3. This act shall take effect upon its passage.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, having considered the question upon which our opinion is required under the order of April 4, 1911, a copy of which is hereto annexed, are constrained to answer it in the negative. The principles applicable to statutes of this kind were considered and discussed in Commonwealth v. Emerson, 165 Mass. 146, Commonwealth v. Sisson, 178 Mass. 578, and O'Keeffe v. Somerville, 190 Mass. 110. In the last of these cases a statute was held unconstitutional in part upon grounds which are equally applicable to the House bill referred to in the order, and which require us to hold that the provisions of this bill are unconstitutional.

The bill is drawn in broad terms, and it purports to forbid transactions that are not different in principle from contracts of sale which always have been held to be within the constitutional right of persons in every State to possess and acquire property, to transact legitimate business and to buy and sell and get gain. U. S. Const. Amendm. art. 14. Declaration of Rights, art. 1. We cannot doubt that the bill is intended only to include cases such as this court held not to be included in St. 1884, c. 277, as amended by St. 1898, c. 576, now R. L. c. 214, § 29. See Commonwealth v. Sisson, 178 Mass. 578. The reasons for the

decision in the case just cited would not apply to a decision as to the meaning of this bill.

There is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves any element of chance. Such statutes and ordinances have been held unconstitutional by the highest courts in a large number of States. State v. Shugart, 188 Ala. 86. City Council of Montgomery v. Kelly, 142 Ala. 552. Ex parte McKenna, 126 Cal. 429. Ex parte Drexel, 147 Cal. 763. Denver v. Frueauff, 89 Col. 20. Hewin v. Atlanta, 121 Ga. 723, 781. Long v. State, 74 Md. 565. State v. Sperry & Hutchinson Co. 110 Minn. 878. State v. Ramseyer, 73 N. H. 81. People v. Gillson, 109 N. Y. 889. People v. Dycker, 72 App. Div. (N. Y.) 808. People v. Zimmerman, 102 App. Div. (N. Y.) 103. Winston v. Beeson, 185 N. C. 271. State v. Dalton, 22 R. I. 77. State v. Dodge, 76 Vt. 197. Young v. Commonwealth, 101 Va. 858. There are numerous similar decisions in the federal courts.

The Court of Appeals of the District of Columbia, in its decisions in Lansburgh v. District of Columbia, 11 App. Cas. (D. C.) 512, and in District of Columbia v. Gregory, 85 App. Cas. (D. C.) 271, stands almost alone, although it has been followed by one or two federal judges, in reaching an opposite conclusion.

The recent decision in *Matter of Gregory*, 219 U. S. 210, has no bearing upon the question before us, as the judge who wrote the opinion was careful to put the decision upon grounds that have no relation to the validity of such provisions as those of this bill.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

OPINION OF THE JUSTICES TO THE SENATE.

The provisions of St. 1910, c. 220, requiring the auditor of the Commonwealth in each year to submit to the Governor and Council for examination a printed statement of the estimates for the ensuing fiscal year, which the Governor shall transmit to the General Court with such recommendations, if any, as he may deem proper, and the provisions of § 5 of that chapter that the Governor may, in his discretion, transmit to the General Court from time to time, with his recommendations, if any, thereon, particular items in the documents submitted to him by the auditor, and may withhold other items for further investigation, do not lessen the power, duty and responsibility of the Legislature in regard to appropriations and do not increase the power of the Governor in regard to them, which, beyond making recommendations, he can exercise only by his veto, and the statute creates no interference by the executive department with the power of the legislative department under art. 30 of the Declaration of Rights.

On April 7, 1911, the following order was passed by the Senate, and on April 11, 1911, was transmitted to the Justices of the Supreme Judicial Court. On April 17, 1911, the Justices returned the answer which is subjoined.

WHEREAS, Section 6 of Chapter 220 of the Acts of the year 1910 repealed Section 26 of Chapter 6 of the Revised Laws, as amended by Section 6 of Chapter 211 of the Acts of the year 1905 and Section 5 of Chapter 597 of the Acts of the year 1908; and

WHEREAS, prior to the passage of said act, the auditor and various heads of departments submitted to the General Court items in reference to appropriations; and

WHEREAS, said Chapter 220 of the Acts of the year 1910 made certain changes in reference to matters affecting appropriations by the General Court, and especially by Section 5 of said Chapter gave the Governor of the Commonwealth in his discretion power to transmit to the General Court with his recommendations such items as he saw fit, and further gave him the power to withhold other items; and

WHEREAS, said power has an important bearing on the acts in reference to appropriations to be passed by the General Court; therefore be it

ORDERED, That the Justices of the Supreme Judicial Court be required to give their opinion to the Senate upon the following important question of law: Does said Chapter 220 of the Acts of the year 1910, and more especially Section 5 of said chapter, give to the Executive a power which infringes on the power of the General Court contrary to Article 30 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts?

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, having considered the question upon which our opinion is required by the order of April 7, 1911, a copy of which is hereto annexed, respectfully submit this opinion: The St. of 1910, c. 220, has made but a very small change in the law of the Commonwealth. It has not limited or impaired in any degree the power of the General Court to make appropriations of money to meet the requirements of the Commonwealth. The R. L. c. 6, § 26, as amended by St. 1905, c. 211, § 6, and St. 1908, c. 597, § 5, required substantially the same estimates and statements from officers and boards as are required by the later act. The only additional statement, called for by the present statute, is of the expenditures for the current year and for each of the next preceding two years. This statute also requires the statements to the auditor to be embodied by him in two different documents, one relating to appropriations for general purposes or objects and the other to appropriations for special purposes or objects, instead of having them all embodied in a single document. These are the only material changes in form or substance in the matters to be compiled by the auditor for the information of the General Court.

Under the R. L. c. 6, § 26, he was required to embody these estimates "in one document, which" was to be "printed and laid before the General Court." Under the present statute, which is alike in its provisions in regard to the appropriations for general objects and in those in regard to appropriations for special objects, he is to embody the statements of each class "in one document, which shall be printed, and shall be submitted on or before the first Thursday in January of each year to the Governor and Council for examination. . . . Copies of the document shall be distributed to the members of the Gen-

eral Court." Under the present statute, as under the former one, the auditor is not only to prepare the document, but to cause it to be printed, which means printed in an edition comprising a number of copies suitable for the use to be made of it. Under the former statute he was to cause it to be "laid before the General Court." Under the present statute he is to cause copies of it to be "distributed to the members of the General Court." Now, as formerly, it is to be before the General Court. The only new provision in this particular is the requirement that it shall be submitted "to the Governor and Council for examination, and the Governor shall transmit the same to the General Court with such recommendations, if any, as he may deem proper." As to appropriations for special objects, the Governor "shall make recommendation as to how much should be raised by the issue of bonds and how much should be paid out of current revenue." Under this statute, after the document has been printed, it is to be formally submitted to the Governor and Council for examination, as well as distributed to the members of the General Court; while under the former statute the Governor was left to obtain a copy as he might. Under the present statute he is to transmit it to the General Court, so that they may know that he has had an opportunity to examine it, and he may make recommendations or not, as he chooses. Under the former statute he might make recommendations at any time by address to the General Court upon the subject of appropriations, as he might upon any other subject affecting the interests of the Commonwealth. Under former laws and under this statute, it is the duty of the Legislature to give respectful consideration to recommendations of the Governor; but his recommendations never were of binding force. The only material effect of this statute is to give a legislative invitation to the Governor to examine the documents prepared by the auditor and to make recommendations upon the subjects contained in them if he chooses, and also to give him an implied assurance that his recommendations as to the amount of the appropriations will receive respectful consideration. The power and duty and responsibility of the Legislature in regard to appropriations is no less under this statute than under former ones. The power of the Governor is no greater. His transmission of particular items or his withholding of particular items, under § 5, does not affect the power of the Legislature to go forward and make such appropriations as it deems best, if it chooses to exercise its power. Beyond making recommendations, the Governor has no authority or duty in regard to the subject of appropriations, except by the exercise of the veto power. All that he can do under the present statute former governors could do if they chose, either by recommendations or otherwise, under former statutes.

The statute creates no interference by the executive department with the power of the legislative department under art. 30 of the Declaration of Rights. In the requirement that the Governor shall transmit the document to the General Court and shall make a recommendation as to special appropriations there is no interference by the legislative department with the power of the executive department under this section.

The Legislature, in the exercise of its functions, may pass laws calling for action by the executive department, as it may pass laws calling for action by the judicial department. It is when it attempts to interfere with action taken by the executive department, or the judicial department, under existing laws, and thus to project itself into a field of action which belongs to another department, that art. 80 of the Declaration of Rights is violated. Rice v. The Governor, 207 Mass. 577.

We answer the question in the negative.

MARGUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LOBING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

Opinion of the Justices to the House of Representatives.

The question, whether a previous act of the Legislature purporting to have been passed over a veto of the Governor, the validity of which has been questioned by a board of public officers to whose duties it relates, was approved by such a vote as is required by c. 1, § 1, art. 2, of the Constitution of the Commonwealth, does not relate to the performance by the Legislature of their official duties in regard to a matter pending when the question is asked, and therefore is not a question which under c. 8, art. 2, of the Constitution it is the duty of the Justices to answer when addressed to them by the House of Representatives.

THE following order was passed by the House of Representatives on April 24, 1911, and on April 27, 1911, was transmitted to the Justices of the Supreme Judicial Court. On April 28, 1911, the Justices returned the answer which is subjoined.

WHEREAS, An Act entitled "An Act relative to qualifications for examination by the Civil Service Commission" was enacted by the General Court of Massachusetts at its present session, and was laid before His Excellency the Governor for his revisal; and

Whereas, Said act was returned to the House of Representatives, in which branch it originated, with the objections of the Governor thereto in writing; and, after reconsideration, was declared passed by the House of Representatives, notwithstanding said objections, 155 members having voted in the affirmative and 51 members in the negative; and the bill, together with the objections, was sent to the Senate and was there agreed to by two-thirds of said Senate,—all in accordance with Chapter 1, Section 1, Article II, Part the Second, of the Constitution of Massachusetts; and

WHEREAS, The Civil Service Commission, whose authority is affected by the passage of said act, has raised the question of its legality, on the ground that less than two-thirds of the entire membership of the House of Representatives voted to pass the bill, notwithstanding the objections of His Excellency the Governor; therefore be it

ORDERED, That the Justices of the Supreme Judicial Court be required to give to the House of Representatives their opinion upon the following important question of law:

Do the provisions of Chapter 1, Section 1, Article II, Part the Second, of the Constitution of Massachusetts require, in order to pass a bill or a resolve over the veto of the Governor, that there shall be an affirmative vote of two-thirds of the entire membership of the branch of the General Court in which the bill or resolve originated, or is an affirmative vote of two-thirds of the members present in the branch in which the bill or resolve originated sufficient?

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have received the question upon which our opinion is required, a copy of which is hereto annexed.

Under the Constitution of Massachusetts the Justices of the Supreme Judicial Court are required to give opinions to each branch of the Legislature only "upon important questions of law, and upon solemn occasions."

It sometimes has happened that opinions have been required when the nature of the questions or the importance of the occasion has not been such as to justify the Justices in exercising the power conferred upon them by the clause of the Constitution under which the questions were put. For some of these occasions see 122 Mass. 600; 148 Mass. 623; 150 Mass. 598. The reasons for declining to act have been stated at length at different times.

In Opinion of the Justices, 186 Mass. 603, 608, after a brief discussion of the subject, it is said that we ought to answer "only so far as our opinion is desired as an aid in the performance of official duties in regard to a matter then pending." The same rule is also discussed and reaffirmed in Opinion of the Justices, 190 Mass. 611, 612, which relates to questions similar to that now before us.

In the present order we discover nothing that shows any action or proceeding now pending before the House of Representatives which makes an answer to the question important for its guidance or constitutes this a solemn occasion. The fact that the Civil Service Commission has raised a question as to the legality of the act is no sufficient reason for invoking the ex-

ercise of this extraordinary power under limited constitutional authority.

We therefore respectfully ask to be excused from answering the question.

MARCUS P. KNOWLTON.

JAMES M. MOBTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

Under the Constitution of this Commonwealth a tax upon property must be proportional as well as reasonable, and therefore a statute which would operate to impose a different rate of taxation upon personal property from that imposed on real estate would be unconstitutional.

Under the Constitution of this Commonwealth the Legislature cannot impose an excise tax on the mere ownership or possession of personal property of every kind.

THE following order was passed by the House of Representatives on May 1, 1911, and on May 5, 1911, was transmitted to the Justices of the Supreme Judicial Court. On May 15, 1911, the Justices returned the answer which is subjoined.

ORDERED, that the opinion of the Justices of the Supreme Judical Court be required on the following important questions of law:

First. Can the General Court, under the clause of the Constitution that grants to it full power to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth, enact a law to create a tax district of the entire Commonwealth for State taxation, and to raise therein revenues by a State tax levied uniformly throughout said district upon all personal property now lawfully subject to local assessment, at the average rate at which real estate was taxed locally throughout the Commonwealth in the year last preced-

ing, or some other reasonable rate whereby the taxation of personalty in the aggregate shall be made substantially proportional with the local taxation of realty in the aggregate in the same district, exempting all realty from State taxes and all personalty from local assessment?

Second. Can the General Court, under the clause of the Constitution which gives it power to levy reasonable excises upon any produce, goods, wares, merchandise and commodities whatsoever brought into, produced, manufactured or being within the Commonwealth, levy an excise upon all personal property now lawfully subject to local assessment therein, at a uniform reasonable rate throughout the Commonwealth, which shall be the average rate at which real estate was taxed therein in the year last preceding, or some other reasonable rate whereby the taxation imposed shall be substantially proportional with the taxation of real estate in the aggregate throughout the Commonwealth, exempting real estate from such excise and personalty from local assessment?

Third. Has the General Court a constitutional right to levy a property or excise tax upon personal property locally by the assessors in the various cities and towns, at a rate uniform throughout the Commonwealth provided for by section 48 of Part III. of chapter 490 of the acts of the year 1909, or some other rate so uniform throughout the Commonwealth, in common with the taxation of real estate therein under existing laws?

The questions above stated are propounded with a view to consideration of two pending bills: namely, House documents Nos. 974 and 1171 of the current year, copies of which are herewith submitted.

[Bill No. 974 was entitled "An Act to provide for the State Assessment of Personal Property." Bill No. 1171 was entitled "An Act to provide for a Uniform Rate of Taxation upon Personal Estate."]

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the questions, a copy of which is hereto annexed, and respectfully answer them as follows:

The interpretation of the Constitution, in that part which is embodied in the questions, is familiar. It has been stated in numerous opinions in litigated cases, as well as in answers to questions propounded by a branch of the General Court.

Taxes under our Constitution are of two kinds, taxes upon property and excise taxes. Those of the first kind must be proportional as well as reasonable. All kinds of property, unless exempted for good cause, must be taxed alike. It is not permissible to make an assessment at one rate upon real estate and at another rate upon personal property. In the Opinion of the Justices, 195 Mass. 607, the subject was fully considered, with a citation of authorities. Mr. Justice Wells in Cheshire v. County Commissioners, 118 Mass. 386, 389, used this language: "That provision requires that all taxes levied under its authority be 'proportional and reasonable,' and forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation. . . . No enactment respecting taxation under this clause conforms to its provisions if it directly and necessarily tends to disproportion in the assessment." It is obvious that the assessments proposed in these questions would be disproportional taxation. The rate upon personal property in any city or town in any year, would be different from the rate of taxation upon real estate in that city or town. The taxation upon personalty would be the same throughout the State, and would be determined by the average rate upon real estate assessed for local taxation in the preceding year. This might vary from the average rate of taxation upon real estate for the current year. As the rates of local taxation upon real estate would differ greatly in different places, the rate in any place might differ widely from the average rate. The result would be that a person having an investment of \$10,000 in real estate would be obliged to bear a materially different part of the public burdens from one in the same city or town having an investment of the same amount in personal property. We answer the first question in the negative.

The authority to levy an excise tax does not include a right

to tax the mere ownership or possession of personal property of every kind. Such a tax cannot be laid upon money in one's pocket, or on deposit in a bank, or on money at interest, or on credits of any kind. This provision of the Constitution was carefully examined, and the cases arising under it were discussed in *Opinions of the Justices*, 196 Mass. 603, 604, 619, 621, and while upon some points there was difference of opinion among us, there was no difference of opinion in regard to the matters stated above. We answer the second question in the negative.

From what we have already stated, it follows that the third question also must be answered in the negative.

MAROUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

OPINION OF THE JUSTICES TO THE SENATE.

By the law of the land as determined by the Supreme Court of the United States a State cannot limit a citizen in the exercise of his right to make contracts by the enactment of a statute forbidding his employment for more than eight hours a day.

The Legislature have power to enact a statute providing that neither the Commonwealth nor any county therein, nor any city or town which has accepted the provisions of R. L. c. 106, § 20, or St. 1909, c. 514, § 42, shall employ in its public work a laborer, workman or mechanic more than eight hours a day, even though this may be considered an interference with individual rights and a detriment to the best interests of the community, because the Commonwealth may prescribe the method in accordance with which any one of these divisions of government shall conduct its public business.

In a statute, providing that neither the Commonwealth nor any county therein, nor any city or town which has accepted the provisions of R. L. c. 106, § 20, or St. 1909, c. 514, § 42, shall employ in its public work a laborer, workman or mechanic more than eight hours a day, and making a violation of the statute by any official or agent a criminal offense, a provision that working more than eight hours in any one day shall be prima facis evidence of a violation of the statute would be unconstitutional.

On May 8, 1911, the following order was passed by the Senate, and on May 8, 1911, was transmitted to the Justices of the Supreme Judicial Court. On May 15, 1911, the Justices returned the answer which is subjoined.

ORDERED, That the Justices of the Supreme Judicial Court be required to give their opinion to the Senate upon the following important question of law:

Are the provisions of the Bill to constitute Eight Hours a Day's Work for Public Employees, now pending in the Senate, and particularly the provisions of section 5 of said bill, constitutional?

An Act to constitute Eight Hours a Day's Work for Public Employees.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. The service of all laborers, workmen and mechanics, now or hereafter employed by the Commonwealth or by any county therein or by any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws or of section forty-two of chapter five hundred and fourteen of the Acts of the year one thousand nine hundred and nine, or by any contractor or sub-contractor for or upon any public works of the Commonwealth or of any county therein or of any such city or town, is hereby restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the Commonwealth or of any county therein, or of any such city or town, or for any such contractor or sub-contractor or other person whose duty it shall be to employ, direct or control the service of such laborers, workmen or mechanics to require or permit any such laborer, workman or mechanic to work more than eight hours in any one calendar day, except in cases of extraordinary emergency. Danger to property, life, public safety or public health only shall be considered cases of extraordinary emergency within the meaning of this section. In cases where a Saturday half holiday is given the hours of labor upon the other working days of the week may be increased sufficiently to make a total of forty-eight hours for the week's work. Threat of loss of employment or to obstruct or prevent the obtaining of

employment or to refrain from employing in the future, shall each be considered to be "requiring" within the meaning of this section. Engineers shall be regarded as mechanics within the meaning of this act.

Section 2. Every contract, excluding contracts for the purchase of material or supplies, to which the Commonwealth or any county therein or any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, is a party which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic working within this Commonwealth, in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contractor shall be requested or required to work more than eight hours in any one calendar day, and every such contract which does not contain this stipulation shall be null and void.

Section 8. Any agent or official of the Commonwealth or of any county therein or of any city or town or any contractor or sub-contractor or any agent or person acting on behalf of any contractor or sub-contractor who violates any provision of this act shall be punished by a fine not exceeding one thousand dollars or by imprisonment for six months or both such fine and imprisonment for each offense.

Section 4. This act shall not apply to the preparation, printing, shipment and delivery of ballots to be used at a caucus, primary, state, city or town election, nor during the sessions of the general court to persons employed in legislative printing or binding; nor shall it apply at any time to persons employed in any State, county or municipal institution, on a farm, or in the care of the grounds, in the stable, in the domestic or kitchen and dining-room service or in store rooms and offices.

Section 5. At any trial arising under the provisions of this act, evidence that laborers, workmen or mechanics have worked or are working over eight hours in any one calendar day shall be prima facie evidence of the violation of the provisions of this act.

Section 6. All acts and parts of acts inconsistent herewith are hereby repealed.

Section 7. This act shall take effect upon its passage.

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have received the order requiring our opinion upon the question, a copy of which is hereto annexed, and we respectfully answer as follows:

The right "of acquiring, possessing, and protecting property" and the right to the enjoyment of "life, liberty, and property" are secured to every citizen by the Constitution of Massachusetts as well as by the Constitution of the United States. These rights include the right to use one's powers and faculties in any reasonable way for the promotion of his interests and the right to make contracts with others. These rights can be regulated by the Legislature, in the exercise of the police power, only in the interest of the public health, the public safety or the public morals, and, in a certain restricted sense, of the public welfare, The general principles touching this subject have been considered repeatedly by the Justices of this Court and by the Supreme Court of the United States. See Commonwealth v. Pear, 183 Mass. 242; Commonwealth v. Strauss, 191 Mass. 545; Welch v. Swasey, 198 Mass. 864, 378; Opinions of the Justices, 193 Mass. 605, 609, 612; Wyeth v. Cambridge Board of Health, 200 Mass. 474, 478; Mutual Loan Co. v. Martell, 200 Mass. 482, 484; Dewey v. Richardson, 206 Mass. 480, 482.

It was decided by the Supreme Court of the United States in Lochner v. New York, 198 U. S. 45, that a State cannot limit a citizen in the exercise of his right to make contracts and to use his powers by the enactment of a statute forbidding his employment for more than eight hours in a day. This judgment of our highest Federal Court is the law of the land, binding upon the courts and citizens of this Commonwealth. It rests upon the ground that there is nothing in ordinary labor, by men of full age for more than eight hours a day, that calls for prohibition in the interest of the public health, the public safety, the public morals, or the public welfare. It is obvious that many of the most successful men could not have attained the prosperity which they have enjoyed if prohibited from working for themselves or contracting to work for others more than a small part of the hours of each day.

The question before us relates only to employment upon public works by the Commonwealth, the counties, and such cities

and towns as have accepted the provisions of two earlier acts. These are divisions of government, established in the public in-The Legislature is supreme in the control of these instrumentalities of government, subject only to the provisions of the Constitution. It may direct, by proper enactment, the method in which any one of these divisions of government shall conduct its public business. It may enlarge or limit the kinds of contracts that either of these divisions may make. It may compel the conduct of the public business in a way that does not promote the prosperity of individuals. Even though it may be considered an interference with individual rights and a detriment to the best interests of the community, which depend largely upon the success of individuals, it may determine that in the construction of their public works the several divisions of government shall make no contracts except of particular kinds. It may determine that in such construction no work shall be done except by persons who are willing to submit to contractual limitations which it could not impose upon men generally in their dealings with one another in their private affairs. A person desiring to perform or furnish labor upon a public work must submit to such terms as the proprietor may impose as a condition of his employment. The Legislature representing and controlling these several divisions of government stands in the place of a proprietor. Because the business to be done is that of one of these divisions of government, persons can engage in doing it only in accordance with the requirements of the controlling authority.

We answer this branch of the question in the affirmative, not because we think that such regulations in regard to the hours of labor for men in common employment would be wise or constitutional, but because it is in the power of the proprietor of a business to prescribe the methods in accordance with which it shall be conducted. This conclusion is supported by *Atkin* v. *Kansas*, 191 U.S. 207.

As to the provision in the fifth section of the proposed act, that working more than eight hours in any one day shall be prima facie evidence of the violation of the statute, there is difficulty. There are many statutes in which the Legislature has enacted that the existence of a fact which ordinarily creates a

strong probability of the commission of an offense shall be prima facie evidence of guilt, and such statutes have been held constitutional. Commonwealth v. Williams, 6 Gray, 1. Commonwealth v. Pillsbury, 12 Gray, 127. Commonwealth v. Rowe, 14 Gray, 47. Commonwealth v. Barber, 148 Mass. 560, 562. The provision of this section of the proposed act differs from those referred to in these decisions and is not within the principles on which the cited cases rest. Under this act "in cases where a Saturday half holiday is given," employees may work more than eight hours on other days of the week. Such cases will be common, and, in all of them, work for a longer time than eight hours on any other day will not indicate a probability of violation of the law. To provide that such a fact shall constitute prima facie evidence that warrants a finding of guilty beyond a reasonable doubt, would be contrary to fundamental principles of criminal law. See opinions in Commonwealth v. Williams, 6 Gray, 1.

We are of opinion that the Legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact, which, in ordinary cases, has no tendency to establish guilt.

For this reason we answer the question in the negative.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

OPINION OF THE JUSTICES TO THE SENATE.

- In accordance with a familiar rule of law, the Legislature may authorize a board of public officers in a city or town to permit or license, as a matter of local administration, such an act or proceeding as constructing and maintaining a bridge connecting buildings on opposite sides of a public street, under the same conditions that the Legislature could authorize or license it by the enactment of a statute.
- A statute, giving authority to a city or town, or to a board of public officers therein, to grant permits or licenses to private individuals, who own the land and buildings on opposite sides of a public street and the fee of the land under the street, to erect bridges over such public street connecting the buildings on the two sides of the street, would not be invalid as class legislation.
- In accordance with an elementary rule of law, a statute authorizing the granting of a permit to erect and maintain for private purposes a bridge connecting buildings on opposite sides of a public street, and providing that persons thereby injured in their property should receive compensation from the grantees of the permit to erect and maintain such bridge, would be invalid as to any persons suffering damage of this kind for which they would be entitled to compensation under the Constitution.
- It is an elementary rule of law that cities and towns are liable to travellers on their highways for injuries caused by unsafe conditions only so far as such liability is imposed by statute.
- Whether under c. 3, art. 2, of the Constitution, by which each branch of the Legislature has authority to require the opinions of the justices of this court "upon important questions of law, and upon solemn occasions," it is the duty of the justices to answer questions relating to elementary rules of law established by numerous decisions of this court and published Opinions of the Justices, here was referred to as a matter which was not determined.

On June 2, 1911, the following order was passed by the Senate, and on June 6, 1911, was transmitted to the Justices of the Supreme Judicial Court. On June 18, 1911, the Justices returned the answer which is subjoined.

WHEREAS, the questions upon which the opinion of the Justices of the Supreme Judicial Court was required by the order adopted on April 4th last, and the answer of the Justices thereto were based upon two pending bills which were somewhat dissimilar in their form and in their substantive provisions, and did not call attention to the fact that one of these, namely, House Bill No. 817, was a bill in favor of certain named individuals, and did not make any mention of the recovery of VOL. 208.

damages for the loss of light and air caused by the construction of a bridge under the authority of an act of Legislature.

NOW, THEREFORE, ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following questions:

- 1. Is it within the constitutional power of the Legislature to enact a law which shall give to the city of Boston the power to grant permits or licenses to the owners of any estates which abut upon any public street and which are situated directly opposite to each other upon opposite sides of said street to erect structures which will bridge said street and which will connect the premises on opposite sides thereof for private purposes, provided that the fee of the street over which the structures are to be erected is in the grantees of said permits or licenses, and subject to the condition that any person owning property or doing business in property which abuts upon a street over which the construction of a bridge is authorized whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of said bridge may have damages therefor determined by a jury upon petition to the Superior Court filed within a specified time against the grantees of the permit for the construction of said bridge?
- 2. Is it within the constitutional power of the Legislature to enact a law which shall suspend the existing law as to certain named individuals so as to allow the city of Boston to grant to such individuals the right to build and maintain a bridge across a certain named public street in said city for the purpose of connecting for private purposes buildings owned by said individuals on opposite sides of said street, or for the purposes of a fire escape, provided that the fee of the street over which the structures are to be erected is owned by the individuals in whose favor the suspension and grant is made?
- 3. Is it within the constitutional power of the Legislature to enact a law which shall suspend the existing law as to certain named individuals so as to allow the city of Boston to grant to such individuals the right to build and maintain a bridge across a certain named public street in said city for the purpose of connecting for private purposes buildings owned by said individuals on opposite sides of said street, or for the purposes of a fire

escape, provided that the fee of the street over which the structures are to be erected is owned by the individuals in whose favor the suspension and grant is made, and that the bridge is so constructed as not to interfere with the reasonable use of the surface of the street for public travel?

- 4. Would the provisions of the bill now pending in the General Court which authorizes the construction of a bridge over Avon Street in the city of Boston, being House Bill No. 817, a copy of which is transmitted herewith, be constitutional if enacted?
- 5. Would the provisions of the bill of similar tenor to said House Bill No. 817, a copy of which is transmitted herewith, be constitutional if enacted?
- 6. Would the provisions of said House Bill No. 817 be constitutional and would the provisions of the bill which forms the subject of the last question be constitutional if these bills were amended by striking out section three of the former bill and section four of the latter bill and substituting in the place of each of said sections the following section:
- "Any person owning property, or doing business in property abutting on Avon Street, whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of a bridge constructed in accordance with the provisions of section one of this act, may have damages therefor determined by a jury upon petition to the Superior Court filed against the grantees of said permit within one year after the permit for the erection of said bridge is approved by the Mayor, as provided in section one of this act"?
- 7. If at any time after the enactment of such a bill and the issue of such permit and the construction or beginning of construction of such bridge under said permit any person using said street and passing under said bridge shall suffer any injury either to his person or to his property on account of the construction or maintenance of said bridge, as by the falling of material used in the construction of said bridge or by the falling of snow or ice from said bridge, will the city of Boston be liable for said injury?

House Bill No. 817.

An Act to anthorize the Construction of a Bridge over Avon Street in the City of Boston.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Upon petition and after seven days' public notice published in at least three newspapers published in the city of Boston, and a public hearing thereon, the board of street commissioners of the city of Boston may, with the approval of the mayor, issue a permit to Eben D. Jordan and Edward J. Mitten to build and maintain a bridge across Avon Street in said city for the purpose of connecting buildings owned by them on opposite sides of said street, or for the purposes of a fire escape, on such conditions and subject to such restrictions as said board may prescribe.

Section 2. No bridge built across said street, under a permit granted as provided in section one of this act, shall be constructed or maintained at a height less than thirty feet above the grade line of said street; and no part of the bridge or its supports shall rest upon the surface of the street.

Section 3. Any person whose property is damaged by reason of the construction of any bridge permitted to be built, as provided in section one of this act, may have the damages therefor determined by a jury upon petition to the superior court therefor filed within one year after the permit for the erection of such bridge is approved by the mayor, as provided in section one of this act.

Section 4. This act shall take effect upon its passage.

The following is "the bill of similar tenor to said House Bill No. 817," referred to in the foregoing order of the Senate.

An Act to authorize the Construction and Maintenance of a Bridge over Avon Street in the City of Boston.

Section 1. Upon petition and after seven days' notice published in at least three newspapers in the city of Boston, and a public hearing thereon, the board of street commissioners in said Boston may, with the approval of the mayor, issue a permit to

Eben D. Jordan and Edward J. Mitten to build and maintain a bridge across Avon Street in said city for the purpose of connecting buildings owned by them on opposite sides of said street, and to serve as a fire escape.

Section 2. Any permit given by the board of street commissioners of the city of Boston, as provided in section one of this act, shall be upon the express condition that the person or persons receiving such permit shall pay a fee for the same, the amount of said fee to be determined by the board of street commissioners. The board of street commissioners may further impose such other conditions and restrictions in granting said permit, as to the Board may seem wise.

Section 8. No bridge built across said street, under a permit granted as provided in the preceding sections of this act, shall be constructed or maintained at a height less than thirty feet above the grade line of said street; and no part of the bridge or its supports shall rest upon the surface of the street.

Section 4. Any person whose property is damaged by reason of the construction of any bridge permitted to be built as provided in the preceding sections of this act may have damages therefor determined by a jury upon petition to the superior court therefor filed within one year after the permit for the erection of such bridge is approved by the mayor. Whatever damages are found by the jury, under the provisions of this section, shall be paid by the person or persons to whom the permit has been granted by the board of street commissioners.

Section 5. This act shall take effect upon its passage.

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, having received the questions contained in your order of June 2, 1911, a copy of which is hereto annexed, respectfully answer as follows:

It is a familiar rule of law in this Commonwealth that the Legislature may authorize a board of public officers in a city or town to permit and license, as a matter of local administration, any act or proceeding, such as is referred to in these questions, that the Legislature itself could authorize or license by the enactment of a statute. Brodbine v. Revere, 182 Mass. 598. Sprague v. Dorr, 185 Mass. 10, 11. Commonwealth v. Crowninshield, 187 Mass. 221, 225. Commonwealth v. Sisson, 189 Mass. 247, 252. Welch v. Swasey, 193 Mass. 364, 375, 376. Sprague v. Minon, 195 Mass. 581, 588. Commonwealth v. Kingsbury, 199 Mass. 542, 546. Wyeth v. Cambridge Board of Health, 200 Mass. 474, 481. Codman v. Crocker, 208 Mass. 146, 155. Commonwealth v. Maletsky, 208 Mass. 241, 247. Dewey v. Richardson, 206 Mass. 430, 438.

We think that a statute such as is mentioned in these questions would not be invalid as class legislation.

The law covering the matters to which these questions relate was very fully stated in an Opinion of the Justices communicated to the House of Representatives on April 17, 1911, ante, 608, which appears by your order to be before the Honorable Senate.

It is elementary doctrine that such an amendment as is proposed, providing that the damages to persons injured in their property shall be paid by the grantees of the permit, who are private parties, would not secure compensation to such persons in the manner required by the Constitution and as to them, in reference to damages to which they might be entitled under the Constitution, would render the statute invalid. It is equally elementary law that cities and towns are not liable in damages to persons for injuries received from unsafe conditions, while travelling on a highway, unless there is a statute imposing a liability for such conditions.

Without determining whether, in view of numerous decisions of this court and published Opinions of the Justices, the questions submitted to us are of a kind that ought to be answered as "important questions of law" within the meaning of the Constitution, we give this opinion, and we do not deem it necessary to answer more particularly.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

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ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

AGENCY.

Existence of Relation.

1. At the trial of an action where a material issue is, whether the plaintiff was employed by the defendant, if there is evidence tending to show that the plaintiff, before going to work, asked the defendant, who "was engaged in building three houses on a parcel of land, the title to which stood in his wife's name," "Are you the boss?" and that, receiving an affirmative reply, he asked further "Is it all right to go to work?" to which the defendant replied, "Sure, I want three or four men. This is a hurry job"; that the defendant furnished to the foreman of the job pay envelopes which the foreman handed to the men and that the defendant gave some directions as to the way in which the work should be done, the jury is warranted in finding that the plaintiff was in the employ of the defendant. White v. Newborg, 279.

Attorney at law for person agreeing to sell land, who, with consent of client, acted for purchaser in examination of title, was held under circumstances to have waived for purchaser requirement that papers should be passed at certain time and place although contract of sale provided that any change of time and place must be by agreement in writing between parties, see Contract, 15.

Scope of Authority.

One, who is invited or seeks to make contract with municipal corporation, is chargeable with knowledge of extent or lack of authority of corporation

Agency (continued).

and its various officers to make such contract, see MUNICIPAL CORPORA-TIONS, 1.

Attorney at law for person agreeing to sell land, who, with consent of client, acted for purchaser in examination of title, was held under circumstances to have waived for purchaser requirement that papers should be passed at certain time and place although contract of sale provided that any change of time and place must be by agreement in writing between parties, see CONTRACT, 15.

Ratification of Acts of Agent.

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Duty of Agent to Principal.

- 2. If an agent in charge of property belonging to his principal takes a secret profit or commission in regard to the matter in which he is employed, he loses his right to his agreed compensation, although the result may be to give the principal the benefit of valuable services rendered by the agent without compensation. Little v. Phipps, 881.
- 3. If an agent in charge of property belonging to his principal takes a secret commission, by which he loses his right to compensation for his services, he cannot avoid this result by showing that it was the custom for agents to take such commissions without the knowledge of their principals, because such a custom would be contrary to sound public policy. Ibid.
- 4. In a suit in equity for an accounting, brought by the owner of certain real estate against his agent, in whose hands the property had been placed for management and sale at a profit, with an agreement that on the sale of the property by the defendant as agent, after paying the incidental expenses, the plaintiff should be paid the money advanced by him for the purchase of the property with interest at the rate of six per cent and that the net balance should be divided equally between the plaintiff and the defendant, it appeared that the defendant sold the property at a profit, but that in rendering an account to the plaintiff of incidental expenses he charged \$50 as paid to an attorney for examining the title, when in fact he had paid the attorney only \$25. Held, that this secret discount, whether taken with a corrupt intent or not, was a failure of duty on the part of the defendant which deprived him of his right to retain his stipulated portion of the net proceeds of the sale or to receive any compensation for his services. Ibid.
- There was held to be no inconsistency or impropriety in attorney at law acting for plaintiff in action for personal injuries against certain person and, after that person's death, for administrator of his estate in procuring property, part of which was used to pay client's claim, see ATTORNEY AT LAW, 1.

Liability of Principal to Agent.

Agent's commission.

- 5. Where, at the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it, and the defendant contended that no commission was due the plaintiff as to such undelivered merchandise because of the course of dealings between the parties and introduced evidence tending to show that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, the plaintiff should be allowed to testify as to peculiar facts regarding such previous occasions in order to rebut the inference which otherwise might be drawn from the fact that in those instances he did not receive his commissions. Bartow v. Parsons Pulp & Paper Co. 232.
- 6. At the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it, and the defendant contended that no commission was due to the agent as to such undelivered merchandise because of the course of dealings between the parties, and introduced evidence that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, and the plaintiff's counsel, in questioning the plaintiff regarding one of such occasions, asked what were the "reasons" why he did not then claim a commission. In reply, the plaintiff stated in substance that the failure of the defendant to deliver the merchandise on that occasion was due to freight car complications which were no fault of the defendant's, and that he, the plaintiff, "told [the defendant he] need not ship it," and added, "Under the circumstances I thought it would be very poor taste on my part to demand a commission." The defendant excepted to the question and to so much of the answer as gave a "description . . . of opinions and feelings with regard to the facts," and the plaintiff's counsel stated that he was "willing to have such portions of the answer stricken out." The defendant made no motion for such purpose. Held, that under the circumstances the exceptions must be overruled although it was not accurate to ask for the plaintiff's "reasons," because so much of the answer as was incompetent the plaintiff had offered to have stricken
- 7. Where, at the trial of an action by a broker for a commission for procuring a sale of merchandise for the defendant, it appeared that the commission was agreed upon and that the contract of sale was made; but it also appeared that a part of the merchandise was not delivered because the customer refused to accept it and the defendant contended that no commission was due the plaintiff as to such undelivered merchandise because of the course of dealings between the parties and introduced evidence

tending to show that on previous occasions of sales to other customers procured by the plaintiff he had not received commissions for such merchandise as was not delivered, and the plaintiff testified as to facts, which must have been known by the defendant and which, if believed, showed that the plaintiff's failure to receive commissions on the occasions in question did not affect his right to accept a commission for the sales which were the subject of the action, it is proper for the presiding judge to refuse to rule that "No reason of the plaintiff for not claiming commission on balances contracted for but not shipped is evidence unless accompanied by evidence that it is disclosed." Bartow v. Parsons Pulp & Paper Co. 282.

In tort.

Liability of principal for personal injuries received by agent while at work within scope of employment, see NEGLIGENCE, 1-28.

Liability of Principal to Third Person.

Discharge of police officer, who made arrest without warrant, from liability for false imprisonment or illegal arrest, discharges one who assisted him in making arrest and carrier of passengers whose agent person assisting officer was, see Joint Tortfrasors, 1; compare Carrier, 1.

Action for personal injuries against owner of real estate by employee of contractor who was upon premises to move certain machinery, in which plaintiff contended that injuries were due to negligence of employees of owner of building who were assisting contractor's employees in work, see Negligence, 66.

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Certain bequest of sum to trustee to purchase annuity for niece of testator was held to give niece right to receive money outright and to interest from expiration of one year from death of testator, see DEVISE AND LEGACY, 7, 8.

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APPROPRIATIONS.

Respective duties and powers of General Court and of Governor with regard to appropriations were not changed by St. 1910, c. 220, see Constitutional Law, 18.

ARBITRAMENT AND AWARD.

In order to show performance of provision as to reference to arbitrators in Massachusetts standard form of fire insurance policy, it is necessary to

show, not only that arbitrators were appointed and met and agreed upon and signed award, but also that parties were notified thereof, see INSURANCE, 9.

ARREST.

Person, who has been arrested without warrant for drunkenness and after he has recovered from intoxication has made statement in writing and request for release under provisions of St. 1905, c. 884, and has been released, cannot recover from officer who arrested him, or from person who assisted officer or from carrier of passengers whose agent person who assisted officer was, see False Imprisonment, 1; Waiver, 1; Joint Tortfeasors, 1; Carrier, 1.

ATTACHMENT.

Excessive.

- If a deputy sheriff makes an attachment of personal property purposely
 excessive in amount, he has exceeded his authority and is liable to the
 owner of the property in an action of tort for any injury which his unlawful act has caused. Williams v. Eastman, 579.
- 2. Where an officer makes an attachment of personal property it is his duty to decide, as best he can, whether the property attached will prove sufficient to satisfy the plaintiff's claim, and, if in the exercise of this discretion he acts in good faith, he will not be liable to the debtor for attaching through an honest mistake a greater amount of property than is necessary. Ibid.
- 3. In an action against a deputy sheriff for wilfully making an attachment of the plaintiff's property excessive in amount, where there is evidence that the defendant took and held in his possession goods of the plaintiff largely exceeding in value the amount which the defendant was commanded to attach, this is a circumstance for the consideration of the jury, in connection with the other evidence, in determining the true character of the defendant's conduct, but, unless they find that the defendant made the attachment for an excessive amount wilfully, he cannot be held liable. Ibid.

Dissolution.

4. The provision of R. L. c. 167, § 112, that "an attachment of real or personal property shall be dissolved if the debtor dies before it is taken or seized on execution and administration of his estate is granted in this Commonwealth upon an application therefor made within one year after his decease," applies to an attachment made by trustee process upon property alleged to have been fraudulently conveyed or concealed upon a petition for an execution to enforce a decree for alimouy. Mcllroy v. Mcllroy, 458.

ATTORNEY AT LAW.

Single Employment.

 There is no inconsistency or impropriety in an attorney at law, with the knowledge and consent of all persons interested, acting for a plaintiff in procuring a judgment for damages for personal injuries against a certain defendant, and, after that defendant's death, acting for the administrator of his estate in prosecuting successfully a suit in equity to obtain possession of certain property and money belonging to his estate, a part of which thereupon is applied to settling the judgment obtained against the intestate in the action for personal injuries, the attorney receiving the payment in behalf of his client in that case. *Peckham* v. *Ramsey*, 112.

Right to Compensation and in Judgment.

- An attorney at law, who as sole counsel has prosecuted an action at law
 to final judgment in behalf of his client, does not thereby become the
 owner of so much of the judgment as is taxable costs. Dwyer v. Ells, 195.
- 8. While, under R. L. c. 165, § 48, an attorney at law, who has prosecuted a suit to final judgment in favor of his client, has a lien on the judgment for the amount of his fees and disbursements, he has no rights in the judgment except those created by the statute, and therefore, subject to the lien, the entire judgment, including taxable costs, is the property of the client and not of the attorney. *Ibid*.
- Suit in equity to reach and apply, in satisfaction of debt alleged to be due to plaintiff, attorney at law, for services rendered and to be rendered under special contract, property alleged to have been conveyed by debtor, before debt to plaintiff was contracted, with intent to hinder, delay and defeat future as well as existing creditors, where such conveyance did not make debtor insolvent, see Equity Jurisdiction, 14-16.

AUDITOR.

See PRACTICE, CIVIL, 7-9.

AUTOMOBILE.

Registration.

- 1. A person driving or being transported upon a highway in an automobile which is not registered according to statutory requirements has not the rights of a traveller lawfully upon the public way. Chase v. New York Central & Hudson River Railroad, 137.
- 2. Perhaps the word "sold," as used in St. 1903, c. 478, § 2, providing that, after registration in a certain way of an automobile or motor cycle by a manufacturer or dealer, the automobile or motor cycle "shall be regarded as registered" "until sold or let for hire or loaned for a period of more than five successive days," should be held to mean "sold and delivered," per Knowlton, C. J. 1bid.
- Certain acts of directors and of certain officers of two corporations, which were held to constitute sale by one corporation to other of automobile so that, upon vendee corporation using automobile on highway without again registering it, persons in it became trespassers upon highway and not entitled to recover for injuries resulting from ordinary negligence of third persons, see SALE, 1-3; EVIDENCE, 9.

Operation.

Action for personal injuries and damage to plaintiff's horse and wagon resulting from collision with automobile of defendant on dark, narrow country road, see Negligence, 47, 48.

Other actions involving questions as to negligence in use of automobile, see Negligence, 56-58.

BILLS AND NOTES.

Payment.

- 1. In an action against a husband and wife upon a joint and several promissory note of which they were the makers, the defendants in their answer alleged a general denial and payment. At the trial the execution and delivery of the note for a valuable consideration were admitted, and there was evidence that the plaintiff had agreed when the note was given that certain services thereafter to be rendered to the plaintiff by the defendants severally should be credited upon the note, and that such services were rendered. The husband testified that at some time in the year when the note became due the plaintiff said to him that he owed the plaintiff money, to which the husband replied that he did not, that thereupon the two went to see a common friend to whom they explained the matter and who said it was "all right" on the defendants' part, "and they then came away and the plaintiff appeared perfectly satisfied and never made any claim . . . afterward until the bringing of the suit." A verdict for the plaintiff was ordered. Held, that the verdict should not have been ordered, because a finding was warranted that the plaintiff and the defendant husband, who acted for both defendants, agreed to set the two claims then due one against the other, and, if the jury so found, each claim would have paid the other and the defense of payment would have been made out. McGuinness v. Kyle, 443.
- 2. The makers of a joint and several note can make with the payee at the time of the delivery of the note a binding agreement that, when it comes due, the makers shall set off against the note the value of services rendered by them severally to the payee, and in an action by the payee against the makers upon the note, the makers, if they set up such independent collateral agreement in their answer, can rely thereon in defense. *Ibid*.

But if answer in such action is only general denial and payment, no such collateral agreement can be relied upon, see PLEADING, CIVIL, 1.

Sending of check which, under circumstances, was held not to be payment of account, see PAYMENT, 8, 4.

Action for Balance due on Mortgage Note.

Mortgagee of real estate is not estopped, by recital in affidavit of sale on foreclosure that property was sold for \$12,500, from showing, in action upon note for balance alleged still to be due, that property was sold for \$10,000, see Mortgage, 8.

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Questions as to admissibility of certain evidence determined in actions upon promissory notes against indorsers, husband and wife, where wife contended that her indorsement, which was in handwriting apparently not her own, was forged, and plaintiff contended that handwriting was feigned for purposes of committing certain fraud upon wife's father, see EVIDENCE, 6-8, 12.

BOARD OF HEALTH.

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Where bill of exceptions states only that on day of entry of writ in court ad damnum of writ was increased "by agreement of counsel," yet, if statement of increase appears as one of docket entries in certified copy of record of court, it will be assumed that such amendment by agreement received approval of court, see Practice, Civil, 5.

Surety on certain bond given under R. L. c. 6, § 77, as security for payment by contractor for labor performed and for materials used in construction of public work under contract with Commonwealth, was held not to have right under circumstances to insist that payment from Commonwealth of funds reserved by it should be applied wholly to payment of claims secured by bond, see Equity Jurisdiction, 17.

BOSTON.

Power of Council and of Mayor under Charter Amendment of 1885.

1. A vote of the city council of Boston in 1891, authorizing the board of health to lease from the owner of a certain wharf "a location for a boat landing," and a further vote of the council in 1896, authorizing the board of health to extend a lease made in accordance with the previous vote, the rental "to be charged to the appropriation for city council incidental expenses," were inoperative and void, being contrary to the provisions of St. 1885, c. 266, § 12, in force at the time, that the council should not "directly or indirectly take part in the employment of labor, the making of contracts, the purchase of materials or supplies, the construction, alteration or repair of any public works, buildings or other property, or the care, custody and management of the same, or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except such as may be necessary for the contingent and in-

- cidental expenses of the city council or of either branch thereof." Commercial Wharf Corporation v. Boston, 482.
- 2. The mayor of Boston in 1891 had no power, either under St. 1885, c. 266, § 6, or under St. 1890, c. 418, § 6, to execute on behalf of the city a covenant to pay rent contained in a lease to the city from the owner of a wharf of a landing place thereon, which the city council, contrary to the provisions of St. 1885, c. 266, § 12, had voted to authorize the board of health to lease, and such a covenant, contained in a lease made in accordance with such a vote and executed and delivered on behalf of the city by the mayor, is inoperative and void, as also is an extension thereof to a period in 1901; and such invalid acts are not made valid by payments by the city of rent under the covenant in accordance with votes of the city council attempting to authorize such payments from an appropriation made for incidental expenses of the council, such payments being unlawful, nor by acts of subsequent mayors which, if such mayors had had power to execute the lease on behalf of the city, would have amounted to ratification of the lease and its extension. Ibid.

And, although city occupied landing place under such circumstances and for time pays rent, it is not liable for use and occupation for period of continued occupancy after it ceased to pay, see MUNICIPAL CORPORATIONS, 6.

BRIBERY.

Various questions which were determined on exceptions by defendants indicted jointly for conspiracy to bribe, see Conspiracy, 1-8.

BROCKTON.

Sidewalk assessment in Brockton which was held to be invalid because of defect in order of board of aldermen with regard thereto, see Tax, 5.

CARRIER.

Of Passengers.

- In an action against a carrier of passengers for an illegal arrest and false imprisonment alleged to have been committed by its servants, if it appears that the servants alleged to have committed the illegal acts are not liable for them or have been released from such liability, this exonerates the carrier and is a defense to the action. Hurgan v. Boston Elevated Railway, 287.
- Conductor of street railway corporation has no authority to waive on its behalf certain rules as to where fireman, travelling free upon car, shall ride, see Negligence, 34.
- Action maintained against elevated railway company for injury to passenger in station due to slipping upon banana peel negligently allowed to remain on platform, see Negligence, 42.
- Actions against street, elevated railway, and railroad companies for injuries due to negligence of their servants or agents, see Negligence, 29-46.

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Facts held not to justify consignee in inferring that time had come for unloading of car loaded with goods consigned to him, see NEGLIGENCE, 45. Duties under R. L. c. 100, § 50, of persons conducting general express busi-

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Writ of certiorari is not remedy to compel assessors to revise record or correct alleged errors in refusal to abate tax, see Tax, 9.

CHARITY.

What constitutes.

- Gifts for public educational purposes constitute public charities. Rickardson v. Essex Institute, 811.
- The mere fact that a gift for a charitable purpose is intended by the donor also as a private memorial to members of his family does not impair its public character or legal validity. Ibid.
- 8. The owner of a house, which, although to some extent remodelled, was a good example of the architecture of the Revolutionary period, which stood in the midst of ample grounds and gardens and was furnished with many articles constituting a collection of household antiques, the house and its contents being of educational interest and value as a kind of museum and the grounds being so situated and of such character as to be adapted for use as a small park or open space and, so used, of substantial benefit to the public, by his will gave the house and grounds, gardens and contents of the house to a corporation, directing that " the house may not in the least degree be dismantled, but stand forever as a memorial to the family of "an ancestor of the testator, that it be kept open to visitors who might wish to see the collection of household antiques, with a custodian and caretaker in charge, that there be no public meetings or crowded receptions, that the gardens be used for the cultivation of what might be useful in the study of botany and that the grounds be kept open for the enjoyment of the public so far as practicable and be freely used by all students of botany whether in public or private schools. Provision was made for a possible extension of the grounds by purchase of land adjoining, and for the employment of an instructor and for free lectures in botany subject only to such rules and conditions as might be deemed necessary for the best interests of the classes. Held, that the gift was for educational and other purposes and came within the scope of what constitutes a public charity, although the motive in making it was to establish a perpetual memorial to the testator's family. Ibid.

Real estate, held by city to apply income thereof to maintenance and improvement of its common and parks, is held upon valid public charitable trust and is exempt from taxation, see Tax, 6.

Administration.

- 4. If a gift is made by will to a certain charitable, benevolent, literary or educational corporation and the gift constitutes a public charity irrespective of whether the corporation designated accepts it or not, the charity will not be allowed to fail for want of a trustee to administer it. Richardson v. Essex Institute, 311.
- 5. Each of two sisters owned a one half interest in certain real estate and personal property. Each made a will, which, without mentioning the will of the other, gave all of her property to her sister for life, and, after her sister's death, by a paragraph containing over seven hundred words which excepting for trifling variations were identical with the words used in her sister's will, gave her one half interest in the real estate and personal property above mentioned to a certain corporation for charitable purposes. After the death of both sisters, in suits in equity by the executor of the will of one and the administrator with the will annexed of the estate of the other for instructions, it was held, that there was no doubt that a joint scheme was contemplated by the two sisters, and that it was not impossible to administer the separate gifts as one public charity. Ibid.

CHELSEA FIRE.

Various questions determined with regard to rights of certain mortgages to insurance to be paid after loss of premises in Chelsea fire of April 12, 1908, see INSURANCE, 8, 10-14.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CODICIL.

Construction of codicil which referred to and incorporated part of will, see DEVISE AND LEGACY, 10.

CONDUCT OF TRIAL.

In actions at law, see Practice, Civil, 9, 12-24, 41, 46; Contracts, 5, 12; Evidence, 8, 5, 18; Insurance, 1, 4, 6; Landlord and Tenant, 4; Sale, 11, 12; Witness, 1, 2.

In criminal proceedings, see Practice, Criminal, 4.

CONSPIRACY.

What constitutes.

At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, there was evidence of conversations and acts of the mayor which tended to show VOL. 208.

Commpicacy (continued).

that he took part in such a conspiracy and of many circumstances tending to show that the mayor had knowledge that attempts at bribery were going on and participated in them. Upon exceptions alleged by the defendant mayor alone, it was held, that there was evidence warranting a finding that that defendant conspired with the persons who were engaged in the bribery to accomplish, if possible, the removal of the chief engineer of the fire department by that means, which was sufficient to sustain a conviction under the indictment. Commonwealth v. White, 202.

Evidence.

Admissions by co-conspirators.

2. At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, although the statements of the different defendants, considered as admissions, are competent evidence only against the persons who made them, yet, if a material transaction, like the acceptance of a bribe or an attempt to influence one of the aldermen by the gift of a bribe, was accomplished wholly or in part by words, proof of the transaction by stating the words is competent against any of the defendants in whose trial the transaction is a circumstance proper to be proved. Commonwealth v. White, 202.

Admission by conduct.

8. At the trial of an indictment against a mayor of a city and five other defendants for a conspiracy to bribe three members of the board of aldermen of the city to vote to approve the removal by the mayor of a certain person from the office of chief engineer of the fire department, a witness, called by the Commonwealth, testified that, at the time that this removal was being most actively agitated, the mayor and two of the persons who were shown to have been active in attempting bribery were in the mayor's office together, and that the mayor's private secretary asked the witness to retire, saying that "they wanted to have a private conversation." The presiding judge allowed the jury to consider this evidence against the defendant mayor if they found that the remark was made with the knowledge and consent of that defendant. Upon exceptions alleged by the defendant mayor alone, it was held, that there was no error; that something reasonably might be inferred as to authority to make the remark from the fact that the private secretary of the mayor assumed to give a direction to a visitor in the mayor's presence, and that on the evidence the jury might have found that the defendant mayor heard the remark and from his silence might infer his assent to it. Commonwealth v. White, 202.

CONSTITUTIONAL LAW.

Eminent Domain.

 In accordance with an elementary rule of law, a statute authorizing the granting of a permit to erect and maintain for private purposes a bridge connecting buildings on opposite sides of a public street, and providing that persons thereby injured in their property should receive compensation from the grantees of the permit to erect and maintain such bridge, would be invalid as to any persons suffering damage of this kind for which they would be entitled to compensation under the Constitution. Opinion of the Justices, 625.

2. It is within the constitutional power of the Legislature to permit a city or town, which owns and occupies for municipal purposes the land and buildings on opposite sides of a public street or highway, and also owns the fee of the land over which the street or highway is laid out and constructed, to erect a bridge or structure above such street or highway connecting the two buildings. But where the land over which the street or highway is laid out and constructed belongs to a private owner, such a bridge or structure can be authorized to be built only when the municipal purposes for which the buildings are used are public purposes and then only with the consent of such private owner or upon paying him compensation. Opinion of the Justices, 603.

Impairment of Right to make Contracts.

3. By the law of the land as determined by the Supreme Court of the United States a State cannot limit a citizen in the exercise of his right to make contracts by the enactment of a statute forbidding his employment for more than eight hours a day. Opinion of the Justices, 619.

Fair and Impartial Trial.

Provision, in proposed statute making employment of any one upon public work for more than eight hours each day a criminal offense, that working more than eight hours in any one day shall be *prima facie* evidence of violation of statute, would be unconstitutional, see Constitutional Law, 10.

Class Legislation.

4. A statute, giving authority to a city or town, or to a board of public officers therein, to grant permits or licenses to private individuals, who own the land and buildings on opposite sides of a public street and the fee of the land under the street, to erect bridges over such public street connecting the buildings on the two sides of the street, would not be invalid as class legislation. Opinion of the Justices, 625.

Police Power.

5. A statute making it a criminal offense to engage in any gift enterprise, and providing that a person who in any manner holds out a promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any article or thing shall be deemed to be engaging in a gift enterprise within the meaning of the statute, would be unconstitutional. Opinion of the Justices, 607.

Constitutional Law (continued).

- 6. It is within the constitutional power of the Legislature to confer upon a city or town the power to grant permits to private owners of the land and buildings on opposite sides of a public street or highway, who also own the fee of the land over which the street or highway is laid out and constructed, to erect a bridge or structure above such street or highway connecting the two buildings. Opinion of the Justices, 603.
- 7. It is within the constitutional power of the Legislature, in enacting a law conferring upon a city or town the power to grant permits or licenses to private individuals, who own the land and buildings on opposite sides of a public street and the fee of the land under the street, to erect bridges over such public street connecting the buildings on the two sides of the street, to provide that such licenses shall be revocable at any time by the city or town and that the city or town shall charge a rent for such licenses. Ibid.
- 8. In accordance with a familiar rule of law, the Legislature may authorize a board of public officers in a city or town to permit or license, as a matter of local administration, such an act or proceeding as constructing and maintaining a bridge connecting buildings on opposite sides of a public street, under the same conditions that the Legislature could authorize or license it by the enactment of a statute. Opinion of the Justices, 625.

State cannot limit citizen in exercise of right to make contracts by statute forbidding his employment for more than eight hours a day, see ante, 8.

Laws regarding Conduct of Public Business.

- 9. The Legislature have power to enact a statute providing that neither the Commonwealth nor any county therein, nor any city or town which has accepted the provisions of R. L. c. 106, § 20, or St. 1909, c. 514, § 42, shall employ in its public work a laborer, workman or mechanic more than eight hours a day, even though this may be considered an interference with individual rights and a detriment to the best interests of the community, because the Commonwealth may prescribe the method in accordance with which any one of these divisions of government shall conduct its public business. Opinion of the Justices, 619.
- 10. In a statute, providing that neither the Commonwealth nor any county therein, nor any city or town which has accepted the provisions of R. L. c. 106, § 20, or St. 1909, c. 514, § 42, shall employ in its public work a laborer, workman or mechanic more than eight hours a day, and making a violation of the statute by any official or agent a criminal offense, a provision that working more than eight hours in any one day shall be prima facie evidence of a violation of the statute would be unconstitutional. Ibid.

Taxation.

- 11. Under the Constitution of this Commonwealth the Legislature cannot impose an excise tax on the mere ownership or possession of personal property of every kind. Opinion of the Justices, 616.
- 12. Under the Constitution of this Commonwealth a tax upon property must be proportional as well as reasonable, and therefore a statute which would operate to impose a different rate of taxation upon personal prop-

erty from that imposed on real estate would be unconstitutional. Opinion of the Justices, 616.

Remedies given by R. L. c. 12, §§ 77, 78, to person aggrieved by refusal of assessors to abate tax are constitutional, see Tax, 8.

Respective Duties of General Court and of Governor as to Appropriations.

18. The provisions of St. 1910, c. 220, requiring the anditor of the Commonwealth in each year to submit to the Governor and Council for examination a printed statement of the estimates for the ensuing fiscal year, which the Governor shall transmit to the General Court with such recommendations, if any, as he may deem proper, and the provisions of § 5 of that chapter that the Governor may, in his discretion, transmit to the General Court from time to time, with his recommendations, if any, thereon, particular items in the documents submitted to him by the auditor, and may withhold other items for further investigation, do not lessen the power, duty and responsibility of the Legislature in regard to appropriations and do not increase the power of the Governor in regard to them, which, beyond making recommendations, he can exercise only by his veto, and the statute creates no interference by the executive department with the power of the legislative department under art. 30 of the Declaration of Rights. Opinion of the Justices, 610.

Opinion of the Justices.

- 14. Whether under c. 3, art. 2, of the Constitution, by which each branch of the Legislature has authority to require the opinions of the justices of this court "upon important questions of law, and upon solemn occasions," it is the duty of the justices to answer questions relating to elementary rules of law established by numerous decisions of this court and published Opinions of the Justices, here was referred to as a matter which was not determined. Opinion of the Justices, 625.
- 15. The question, whether a previous act of the Legislature purporting to have been passed over a veto of the Governor, the validity of which has been questioned by a board of public officers to whose duties it relates, was approved by such a vote as is required by c. 1, § 1, art. 2, of the Constitution of the Commonwealth, does not relate to the performance by the Legislature of their official duties in regard to a matter pending when the question is asked, and therefore is not a question which under c. 3, art. 2, of the Constitution it is the duty of the Justices to answer when addressed to them by the House of Representatives. Opinion of the Justices, 614.

CONSTRUCTION.

- Of contract, see Contract, 8, 10-13; Guaranty, 8, 4; Sale, 6-8.
- Of bond, see Equity Jurisdiction, 4.
- Of lease, see Landlord and Tenant, 1, 2.
- Of order of Superior Court, see Mandamus, 1.
- Of trusts, see Trust, 2-6; Devise and Legacy, 2, 6, 10.
- Of wills, see DEVISE AND LEGACY, 1-12.
- Of certain words, see WORDS.

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CONTRACT.

What constitutes.

- A statement in a letter to a tradesman that certain goods to be furnished
 by the tradesman to a third person should be "charged" to the writer of
 the letter is equivalent to a promise by the writer of the letter to pay the
 tradesman for goods so furnished. Niles v. Adams, 100.
- 2. The conduct of a tradesman, in putting charges for goods, furnished to a third person on the original promise of another to pay for them, on his books under the name of the third person, is merely an admission on the part of the tradesman to be considered with other evidence on the subject, including explanations by the tradesman of his reason for doing so; and therefore, in an action by the tradesman against the promisor, the judge need not charge the jury that such conduct is prima facie evidence against the plaintiff that he gave credit to the third person and not to the defendant. /bid.
- 3. In an action of contract upon an account annexed for goods sold and delivered to a third person upon an alleged original promise of the defendant to pay for them, there was evidence that, before the goods were delivered, the defendant had sent to the plaintiff a letter in which he had stated that any such goods delivered after a date then two months past should be charged to him personally, that after receiving the letter the plaintiff had delivered the goods in question and had sent bills to the defendant which did not have on them the name of the defendant, but only the names of the third person and of the plaintiff, that the defendant had paid some of the bills and had stated to the plaintiff that, if he had sent the plaintiff the letter above referred to, he "supposed he would have to pay the bill." On the plaintiff's book of original entry the goods stood charged to the third person. Held, that the facts that the charges purported to be made to the third person and that his name appeared on the bills were not decisive that credit was not given to the defendant, and therefore that the question of the liability of the defendant was for the jury. Ibid.
- 4. When an offer in writing to purchase real estate is accepted orally by the owner, a binding contract is made, which is not affected by subsequent negotiations of the parties in an effort to agree upon a modification of the contract unless such negotiations result in an agreement for such a modification. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.
- 5. At the trial of an action for the alleged breach of a contract to purchase certain land, where there was evidence tending to show that the defendant in writing offered to purchase the land and that one F., acting on behalf of the plaintiff with authority, orally accepted the offer and thereafter offered to the defendant for his signature a formal agreement containing terms varying from the defendant's original offer in that it provided for the payment of an additional \$5,000 of the purchase price at the time of the delivery of the deed, the judge instructed the jury as follows: "If there had been an unconditional oral acceptance of the offer, then F. had a perfect right to draw up this additional suggestion or contract without

impairing his rights under the oral acceptance. . . , If you find that this written contract, which was drawn up by F. [after the alleged oral acceptance] was intended by him to be an acceptance, and he thought it was an acceptance, of the contract, and it was an attempt on his part to accept it, and it was not intended by him to be a counter offer modifying the terms already in the offer, then it would not be a rejection of the offer, if it was not intended by him to be a counter offer. If you find that he had not orally accepted the offer earlier, why, then that would not be a rejection of the offer. . . . If F. had accepted orally the offer, and was intending merely to finance the situation and try to get the other \$5,000, that is not a rejection. If, also, he thought that this written proposition which he sent was, in substance, an acceptance of it, and if he intended it to be an acceptance and did not intend to make a definite counter offer, then the right of the plaintiff to accept the offer would still remain open." Held, that these instructions were sufficiently favorable to the defendant. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.

- 6. A letter from one corporation to another contained the following offer: "Gentlemen: I am authorized by our board of directors to offer you the sum of \$100,000 for your property on Camden Street in Boston which we are now occupying on a lease, the terms to be as follows: \$5,000 cash when signing papers, \$5,000 cash on delivery of the deed, remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we shall pay you the sum of \$11,000 per year, you to pay interest on the mortgages and taxes, and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1903." The offer was accepted orally. Held, that a binding contract arose, because such offer contained a sufficiently definite and certain statement of all the essential terms which the parties then intended to introduce into their contract, and was not too indefinite to be the foundation of a final contract; affirming Beach & Clarridge Co.
- v. American Steam Gauge & Valve Manuf. Co. 202 Mass. 177. *Ibid*. Construction of such contract, see *post*, 12, 18, 17.
- 7. In a suit in equity against the owner of certain real estate for the specific performance of an alleged agreement of the defendant to sell the property to the plaintiff, the following facts appeared: An agent of the defendant offered the property to the plaintiff for a certain price in a letter which contained no reference to any rights of way. The plaintiff replied by the following telegram: "Letter received Close deal understand Rights of way are included as we talked." Replying to the telegram the agent wrote, in a letter dated on a September 2 but not received by the plaintiff until September 3, "The matter is closed and the rights of way, as I understand, are included as we talked over." On September 2, by a letter received by the plaintiff on the same day, the defendant declined to sell the property. There was no evidence to show that the agent's letter of

September 2 was mailed before the plaintiff received the defendant's letter of that date. *Held*, that the plaintiff's telegram was not an acceptance of the offer of the agent, but was a counter offer, and that it did not appear that the acceptance by the agent of the counter offer was made before the defendant had declined to sell, and therefore that on that ground the suit properly might be dismissed. *Bradley* v. *Haven*, 800.

Another reason for dismissal of same suit, see FRAUDS, STATUTE OF, 2.

No notice, of acceptance of certain contract for sale of merchandise which had been signed by guarantors before delivery to seller, was held to be necessary from seller to guarantors in order to bind guarantors, see GUARANTY, 2.

Acts of manager of glass manufacturing corporation as to contract for manufacture and sale of bottles, payment of price of which was to be guaranteed by certain individuals, which, when ratified by corporation, together with delivery to such manager of contract signed by guarantors, were sufficient to constitute contract of guaranty, see Guaranty, 1.

Action of tort for damages resulting from plaintiff's relying on false and fraudulent representations by defendants that corporation, of which they were officers and agents, was engaged in legitimate stock brokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents or servants," see False Representations, 1.

Validity.

- 8. A contract in writing, which reasonably can be performed in such a way as to violate no law, will not be held to be invalid because it can be performed in such a way as to commit a criminal offense, especially where it contains a provision that no unlawful act shall be performed. Gaston v. Gordon, 265.
- 9. At the trial of an action to recover rent for the occupation by the defendant of a cottage belonging to the plaintiff, if it appears that an oral agreement to hire the cottage was made on a Sunday, which it is assumed would be void under R. L. c. 98, § 2, St. 1904, c. 460, § 2, and that afterwards the defendant occupied the cottage with the consent of the plaintiff as if holding under him, the presiding judge properly may refuse to rule that the plaintiff cannot recover; because upon the evidence presented it may be inferred from the conduct of the parties on subsequent week days that they made a valid agreement adopting the terms of the agreement of Sunday, which would make the defendant liable for the rent stipulated for on Sunday, or it may be that, in the absence of an express lawful agreement as to the amount of rent to be paid, the plaintiff would be entitled to recover the fair value of the defendant's use and occupation of the plaintiff's cottage. O'Brien v. Shea, 528.
- If effect of fact that contract made on Lord's day was not raised by pleadings or by counsel at trial, it was not absolute duty of judge to rule upon it, see Practice, Civil, 17.

Contract (continued).

Contract by which chemist, who owned certain formulas, delivered them to copartnership according to certain agreements, among which was agreement that he should be paid "fair and equitable share" of net profits, was held not to be void for indefiniteness, see Equity Jurisdiction, 9.

Consideration.

Under circumstances, release of holder of mortgage upon certain real estate insured for his benefit against loss by fire, and indorsement by mortgagor, assented to by insurance company, directing payment in case of loss to new mortgagee, were held to furnish good consideration for undertaking of insurance company to indemnify new mortgagee, see Insurance, 10.

Construction.

- 10. An order in writing, filled in upon an order blank of the seller, for a large number of silver and gold Christmas and New Year post cards, which is dated and is addressed to the seller and is signed by the purchaser, and states the number of cards to be shipped, the descriptive trade number by which they are known and the number of designs, and under the word "Remarks" has the figures and words, "\frac{1}{3} silver \frac{2}{3} gold," and which also states the price per thousand and the total amount to be paid, the terms of payment and the transportation line by which the cards are to be shipped, is not a mere bill of parcels but is a complete contract in writing without ambiguity, which cannot be varied or explained by oral evidence. Traders Commercial Co. v. Tichnor Bros. Inc. 212.
- 11. In an action for a balance alleged to be due under a contract in writing, whereby the plaintiff agreed to do for the defendant all the shoring for underpinning buildings in a certain section of the Washington Street tunnel in Boston, which the defendant was engaged in constructing under a contract made by him with the city of Boston through the transit commission of that city, it appeared that the contract of the defendant with the city contained a clause giving the transit commissioners the right to terminate it if the engineer should certify to them in writing that the contractor was not making such progress in the execution of the work as to indicate its completion within the required time, and that, after a part of the work under the plaintiff's contract had been done by the plaintiff and had been paid for by the defendant, the defendant's contract with the city of Boston had been terminated by the transit commissioners under that clause. The plaintiff's contract contained a provision that all the work should be done according to orders and directions and to the satisfaction of the transit commissioners or their authorized agents, and the plaintiff at the time of making his contract with the defendant had a copy of the defendant's contract with the city and was familiar with its provisions, including that relating to the commissioners' right to terminate it. Held, that, the plaintiff and the defendant having made their contract with knowledge of the possibility of such a termination of the defendant's contract with the city as had occurred and having failed to provide for such a contingency reasonably to be anticipated, the defendant was bound by his absolute promise to pay the plaintiff the contract price for the

work stipulated for in his contract; so that the plaintiff was entitled to recover the unpaid balance of such contract price after deducting from it the reasonable cost of completing the work in accordance with the terms of his contract. John Soley & Sons v. Jones, 561.

- 12. At the trial of an action for an alleged breach of a contract to purchase land, by which it was provided that the owner should "arrange for renewal of" a first mortgage then in force upon the land and overdue "or extension of it until it can be placed for a term of years," where it appeared that the purchaser refused to carry out the agreement unless the mortgage was extended for three years, an instruction to the jury that "a term of years" "means not less than two years" and that, if the owner "was able to get a mortgage for two years... that was a compliance with the contract in that respect," is sufficiently favorable to the purchaser, and the judge need not rule at the request of the purchaser that "three years is not an unreasonable interpretation." Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.
- 18. The contract which arose when the owner of land subject to a mortgage accepted an offer of a corporation to purchase the land, the offer containing a provision that the owner should "arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, [the owner] to pay a sufficient sum on the first mortgage to get it extended," did not require any particular or definite renewal or extension of the first mortgage, but only such a renewal or extension that it could be placed for a term of years, and that the owner should pay a sufficient sum to procure such an extension. *Ibid*.

For further construction of same contract, see post, 17.

Construction of contract guaranteeing performance of contract for purchase of bottles, see Guaranty, 3, 4.

Evidence of customs in fish trade was admitted at trial of action for purchase price of lot of mackerel, to show meaning of terms of contract of purchase, see SALE, 6-8.

Construction of certain bond to convey land, see Equity Jurisdiction, 4.

If contract reasonably can be construed so as to be capable of performance in way not in violation of law, it is valid although it might have been performed in such way as to commit criminal offense, see ante, 8.

Affirmation.

Bringing of action for compensation for making of six pencil drawings, which was held to constitute complete election of remedy based on affirmation of contract, and, after judgment for defendant therein, to preclude plaintiff from disaffirming contract, claiming right to rescind it, and seeking right of recovery upon quantum meruit, see PRACTICE, CIVIL, 6.

Modification.

Contract, which arose on oral acceptance of offer in writing to sell land, and was not affected by subsequent attempts to modify agreement; and correct charge of judge to jury with regard thereto, see ante, 4, 5.

Rescission.

14. If a creditor, to whom a debtor has sent a bank check for what the debtor contends is the amount of the debt, refuses to accept the check as payment and brings an action against the debtor for the amount which the creditor contends is the amount of the debt, such acts do not constitute a rescission of a contract, and therefore a return of the check, so as to place the debtor in statu quo, is not a condition precedent to the bringing of the action; but, even if it were, it is sufficient if the creditor produces the check at the trial and places it in the custody of the court. Illustrated Card & Novelty Co. v. Dolan, 53.

Bringing of action for compensation for making of six pencil drawings, which was held to constitute complete election of remedy based on affirmation of contract, and, after judgment for defendant therein, to preclude plaintiff from disaffirming contract, claiming right to rescind it, and seeking right of recovery upon quantum meruit, see PRACTICE, CIVIL, 6.

Waiver of Provisions.

15. The owner of certain land agreed in writing to sell and convey it at noon on a certain day and at a certain place, free from all incumbrances, to one, who with the owner's assent employed to examine the title for him the attorney at law who he knew was acting for the owner in the transac-The agreement also provided that the time and place for passing papers should not be changed "unless the parties hereto agree in writing to some other time and place." On the afternoon of the day before that appointed, the attorney found that he needed to examine a certain bond before coming to a conclusion as to the title, and he thereupon notified the owner that he need not attend at the time and place appointed. On the morning of the day appointed the attorney told the purchaser that he needed to see the bond. The attorney procured a copy of the bond in the afternoon of that day and tried in vain to reach the purchaser. The next morning he reported the title clear to the purchaser, who refused to accept a deed unless he could be "absolutely guaranteed" that there would be no trouble to him later because of the existence of the bond. Held, that the fact, that the attorney who was examining the title for the purchaser notified the owner, for whom he was acting in other matters regarding the transaction, that he had not finished his examination of the title and would not be ready to report upon it by the time set in the agreement, constituted a waiver by the purchaser of the requirement of a conveyance at that time, notwithstanding the provisions of the contract requiring an agreement in writing for a change in such time. Close v. Martin, 236.

Implied.

In fact.

Fact that oral agreement for rent of cottage was made on Lord's day does not necessarily preclude landlord from recovering rent from tenant because of inference, which properly might be drawn from fact of subsequent occupation, that agreement made on Lord's day afterwards was adopted on week day, see ante, 9.

City council of Boston had no power to make certain lease from owner of "a location for a boat landing" in 1891, nor could any of its officers bind it to pay rent therefor, nor was it, after it had occupied under invalid lease signed by mayor in accordance with invalid vote of council, liable for use and occupation, see Boston, 1, 2; Municipal Corporations, 6.

In law.

Fact that oral agreement for rent of cottage was made on Lord's day does not necessarily preclude landlord from recovering from tenant for use and occupation upon contract implied in law, see ante, 9.

Performance and Breach.

- 16. Where by a contract in writing one agrees to accept a conveyance of certain land "free from all incumbrances," and thereafter refuses to accept such conveyance unless he is "absolutely guaranteed" that there would be no trouble to him later because of the existence of a certain bond, the requirement of a formal tender of a deed by the owner before the bringing of a suit in equity for specific performance of the contract is dispensed with. Close v. Martin, 236.
- 17. Upon the acceptance by the owner of certain land of an offer by a corporation to purchase the land, one of the terms of the offer being that the owner should "arrange for renewal of first mortgage [which was in force and overdue] or extension of it until it can be placed for a term of years," a binding agreement arises, and, if the owner is ready to-carry out the agreement on his part, but the corporation refuses to take the land unless the mortgage is extended for at least three years, the owner by such refusal is excused from further performance or offer of performance on his part, and is entitled forthwith to maintain an action against the corporation for breach of the agreement. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.

Suits in equity for specific performance of contracts, see Equity Jurisdiction, 3, 4; Contract, 7; Frauds, Statute of, 2.

Requirements for specific performance of agreement to convey land, see Equity Jurisdiction, 3.

Unlawful interference by labor union with performance of contract may be enjoined by suit in equity, see LABOR AND LABOR UNION, 8; EQUITY JURISDICTION, 18.

When notice to guarantor of breach of contract guaranteed is necessary to cause guarantor to be liable, see Guaranty, 5.

No such notice was held to be necessary under certain circumstances, see Guaranty, 5, 6.

Bringing of action for compensation for making of six pencil drawings, which was held to constitute complete election of remedy based on affirmation of contract, and, after judgment for defendant therein, to preclude plaintiff from disaffirming contract, claiming right to rescind it, and seeking right of recovery upon quantum meruit, see Practice, Civil, 6.

- Action by subcontractor against contractor for breach of contract, where it had become impossible for defendant to permit plaintiff to perform but impossibility had resulted from events, possibility of happening of which was within knowledge of parties when they made contract, see ante, 11.
- Action for price of goods sold, where sale and amount of price were undisputed and only question was, whether price was to be paid in money or in other goods of defendant, see SALE, 12-14.
- Certain rulings as to failure to call material witness and certain charge of judge at trial of action for purchase price of coal, where manner in which book charges were made by seller was of importance but was not decisive, see Practice, Civil, 21; EVIDENCE, 19.
- Suit by attorney at law to reach and apply property, alleged to have been conveyed by client with intent to hinder, defeat and defraud creditors, in satisfaction of debt alleged to be due plaintiff from client according to special contract for services rendered and to be rendered, was not prematurely brought although services had not been fully rendered, see Equity Jurisdiction, 16.

Impossibility of Performance.

Action by subcontractor against contractor for breach of contract where it had become impossible for defendant to permit plaintiff to perform but impossibility had resulted from events, possibility of happening of which was within knowledge of parties when they made contract, see ante, 11.

In Writing.

Unambiguous lease in writing was held not to be affected by conversation between tenant and landlord's agent which took place before execution of lease, see Landlord and Tenant, 1.

Certain order in writing which was held not to be mere bill of parcels but to be contract in writing without ambiguity, which could not be varied or explained by oral evidence, see ante. 10.

Novation.

Under circumstances, release of holder of mortgage upon certain real estate insured for his benefit against loss by fire, and indorsement by mortgagor, assented to by insurance company, directing payment in case of loss to new mortgagee, were held to furnish good consideration for undertaking of insurance company to indemnify new mortgagee, see INSURANCE, 10.

Of Guaranty,

See GUARANTY, 1-7.

Unlawful Interference with Contract.

Unlawful interference by labor union with contract may be enjoined by suit in equity, see LABOR AND LABOR UNION, 8; EQUITY JURISDICTION, 18.

Impairment of Right to make.

Law, which should attempt to limit citizen in exercise of right to make contracts by forbidding his employment for more than eight hours each day, would be unconstitutional, see Constitutional Law, 3.

CONVERSION.

Equitable conversion, see that title.

CORPORATION.

Officers and Agents.

- It is at least doubtful whether action of the board of directors of a business corporation at a meeting, of which a record was kept, can be proved by oral evidence, per Knowlton, C. J. Chase v. New York Central & Hudson River Railroad, 187.
- Conductor of street railway corporation has no authority to waive on its behalf certain rules as to where fireman, travelling free upon car, shall ride, see Negligenor, 84.
- Acts of manager of glass manufacturing corporation as to contract for manufacture and sale of bottles, payment of price of which was to be guaranteed by certain individuals, which, when ratified by corporation, together with delivery to such manager of contract signed by guarantors, were sufficient to constitute contract of guaranty, see Guaranty, 1.
- Certain acts of directors and of certain officers of two corporations which were held to constitute sale by one corporation to other of automobile so that, upon vendee corporation using automobile on highway without again registering it, persons in it became trespassers upon highway and not entitled to recover for injuries resulting from ordinary negligence of third persons, see Sale, 1-3; Evidence, 9.

Ultra Vires Acts.

2. If a fraternal beneficiary corporation, organized under the laws of another State, undertakes to assume the obligations of a death certificate issued by a Massachusetts fraternal beneficiary corporation, and the member insured by such certificate, accepting the offer of the foreign corporation, joins a body organized as one of its subordinate commanderies and for a period of two years pays assessments to the foreign corporation for the insurance purporting to be given by the terms of his certificate, believing himself to be entitled to all the privileges of a member of the foreign corporation, that corporation, after the death of the member, in an action brought against it by the beneficiaries named in the certificate to enforce its promise, cannot defend the action on the ground that its promise to assume the obligation of the Massachusetts corporation which issued the certificate was ultra vires and that the insured to whom the certificate was issued never performed the formal acts required for becoming a member of the foreign corporation. Timberlake v. Order of the Golden Cross, 411.

Ultra vires acts of railroad corporation in disposing of real estate which was no longer available for purposes of its corporation, see RAILROAD, 6, 7.

Decree pro confesso in suit in equity in another State against Massachusetts fraternal beneficiary corporation among other defendants, declaring that consolidation, with corporation of such State, of Massachusetts fraternal beneficiary corporation was ultra vires, is not res judicata as to Massachusetts corporation if it was not served with process except by publication in accordance with laws of such State, see Res Judicata, 1.

As Successor to Partnership.

Where chemist delivered to partnership certain secret formulas for them to manufacture and put upon market compounds made in accordance with formulas and to pay to him "fair and equitable share" of net profits, and partnership forms itself into corporation which takes over manufacture of formulas, partnership and corporation both are subject to trust under which formulas were delivered to partnership, see Equity Jurisdiction, 8.

Municipal Corporations.

See that title.

COVENANT.

Action of tort for damages resulting from plaintiff's relying on false and fraudulent representations by defendants that corporation, of which they were officers and agents, was engaged in legitimate stockbrokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents or servants," see False Representations, 1.

CUSTOM.

Proof of custom of agents to take secret commissions does not prevent agent from losing commission if he does so, see Agency, 8.

Evidence of customs in fish trade admitted to show meaning of terms of contract for purchase of lot of mackerel, see SALE, 6, 7.

Effect of such customs when proved, see SALE, 8.

Evidence of established custom of railroad corporation, not to run express trains past station while local train is discharging passengers there, was held to be admissible in action against railroad corporation under St. 1906, c. 463, Part II. § 245, for death of passenger, on question, whether passenger, who had left local train, was guilty of gross or wilful negligence in being upon track where he was struck by express train, see RAIL-BOAD, 4.

DAMAGES.

For Property taken or damaged for Public Purposes.

Right to damages of owner of fee in land upon which is public street, in case bridge or structure is erected across street for public purposes, see Constitutional Law, 2; Wax, 8.

In Actions of Contract.

Damages to which plaintiff was entitled in action against guarantors of performance of certain contract for purchase of bottles, see GUARANTY, 3, 4, 7.

Damages in action for breach of contract by which plaintiff as subcontractor was to perform for defendant as contractor part of work of constructing tunnel under Washington Street in Boston, where breach was necessary because defendant's contract had been terminated by transit commission, see Contract, 11.

In Actions of Tort.

1. In an action of tort by a woman for personal injuries, an instruction by the presiding judge, that the plaintiff has a right to have the jury consider the possibility that by reason of the plaintiff's injuries an operation in the future may be necessary, is erroneous, when it is not limited by a further instruction that the plaintiff can recover only for such consequences of her injuries as it is proved by a reasonable preponderance of the evidence reasonably may be expected to follow. Pullen v. Boston Elevated Railway, 856.

New trial on question of damages only was ordered upon sustaining of defendant's exception to erroneous instruction of judge upon matter of damages, see Practice, Civil, 25.

In Suit in Equity.

Suit in equity where mandatory injunction, to compel enforcement of technical right of plaintiff to have removed certain structures which were slight infringements of easement, was refused and plaintiff was held to have only legal right to nominal damages, see WAY, 2.

DEATH.

Death of debtor dissolves attachment by trustee process of property alleged to have been conveyed or concealed fraudulently, see ATTACHMENT, 4.

Effect of death of husband upon operation of order of Probate Court directing husband to pay to wife certain sum monthly for her support, see HUSBAND AND WIFE, 1.

Questions determined in action against railroad company for death of one killed at grade crossing of railroad with highway, see RAILROAD, 2-5.

Actions of tort for injuries resulting in death, see NEGLIGENCE, 10, 14, 15, 59.

DECEIT.

Action of tort for damages resulting from plaintiff's relying on false and fraudulent representations by defendants that corporation, of which they were officers and agents, was engaged in legitimate stock brokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents or servants," see False Representations, 1.

DEED.

Acknowledgment.

1. By the provisions of St. 1895, c. 460, nothing contained in St. 1894, c. 253, with regard to the recognition of the validity of the proof or acknowledgment of deeds and instruments in other States before any officer thereof authorized to take such acknowledgment, provided the authority of such officer is authenticated in a certain manner therein specified, should prevent the acknowledgment of such deeds or instruments in the form and manner lawfully used before the passage of that act or the recording of instruments so acknowledged, and therefore deeds regarding land in the Commonwealth, acknowledged in 1894 and 1898 before a justice of the peace in Maine in accordance with the requirements of Pub. Sts. c. 120, § 6, were entitled to be recorded and recognized here without having appended to them the authentication of the title of the acknowledging officer to his office which St. 1894, c. 253, required. Close v. Martin, 236.

Recording.

See ante, 1.

Estoppel.

Mortgagee of real estate is not estopped, by recital in affidavit of sale at foreclosure that property was sold for \$12,500, from showing, in action upon note for balance alleged still to be due, that property was sold for \$10,000, see Mortgage, 3.

DEVISE AND LEGACY.

To " Heirs."

- 1. A bequest or devise to "heirs" or "heirs at law" of the testator will be construed as having been used accurately and to mean those who take the testator's real estate at the time of his death unless a different intent is plainly manifested by the will. Welch v. Blanchard, 523.
- 2. A testator by the first three clauses of his will gave legacies to various servants, a bequest of money to an academy for a library, and bequests to two unmarried daughters equal to sums given to other daughters upon VOL. 208.

their respective marriages; by a fourth clause he established three trust funds, two for the benefit of servants during their respective lives and one to furnish an income for the purpose of enabling the unmarried daughters to keep the homestead in good condition, the clause ending with the words, "The principal sums or funds shall, as the trusts cease, be distributed to my heirs." A fifth clause gave to his son the land within the fence of the homestead. A sixth and a seventh clause gave the residue of the testator's real estate and the personal property pertaining to the homestead to his unmarried daughters for their lives and the life of the survivor so long as they or she should continue unmarried, and, "after the marriage or death of "such survivor "the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." An eighth clause gave to the son one sixth of the residue of the personal estate and to trustees the other five sixths in trust to pay the income to all of the testator's daughters in equal shares and to the issue of any deceased daughter, such issue taking the mother's share, and "after the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs." In a suit after the death of the survivor of the daughters by the trustees under the eighth clause, for instructions as to the disposition of the fund, it was held, that the word "heirs" in the eighth clause meant real "heirs," and not such persons as would have been heirs had the testator died at the time of the termination of the trust, and therefore that the fund should be distributed among those persons then entitled as heirs of the testator or as succeeding to rights of heirs either as their next of kin or by bequest or assignment. Welch v. Blanchard, 523.

Division of Property as though Testatriz "died unmarried."

See TRUST, 2.

Charity.

Certain provisions in will which were held to be for public charity, although they also were intended to constitute private memorial to members of family of testator, see Charity, 2-5.

Executory Limitation.

- 8. A devise of certain real estate and a bequest of personal property to the husbaud of the testator's daughter "provided, however, and this devise and bequest to him is on condition that he survives my daughter . . . ; if he shall not survive my said daughter, then said " real estate and personal property "shall be the property or my said daughter," do not admit of being construed as a devise and a bequest to the husband or, if he dies during the life of the testator and the daughter survives him, to the daughter. Meins v. Pease, 478.
- 4. A will gave the bulk of the testator's property to his daughter, a part of it in trust to pay the income to herself for life, after her death to her children and the children of a deceased son of the testator, and ultimately to

certain relatives of the testator. No property was given to the daughter's husband in the will. By a codicil the testator revoked a devise of a certain parcel of real estate which the will had given to the daughter, and gave it to the daughter's husband, and also gave him \$15,000, " provided, however, and this devise and bequest to him is on condition that he survives my daughter . . . ; if he shall not survive my said daughter, then said" real estate and personal property "shall be the property of my said daughter." The codicil also contained a provision cancelling all indebtedness which the daughter's husband was under to the testator at the time of the testator's death, and provided that, if any of the relatives mentioned in the trust provision in the will should die before the testator, the gift to such should be void and the daughter's husband should take except in case of the death of one designated relative, and in such case the testator's heirs at law should take. Held, that the codicil gave the \$15,000 and the designated real estate as an absolute bequest and devise to the daughter's husband subject to a conditional limitation over in case he should not survive the daughter, and that in that case the money and real estate should go to the daughter by way of executory bequest and devise. Meins v. Pease, 478.

- 5. Where by a will personal property is given to one absolutely, subject to a conditional limitation over to a second person in case the legatee should die before such second person, the first taker is entitled to receive the bequest without giving security, unless there is danger that it will not be forthcoming if the contingency occurs, and unless security is asked for on that ground. *Ibid*.
- 6. A testator by his will gave to a trustee a certain parcel of real estate and a certain sum of money in trust to pay the income thereof to a nephew during his life and after his death to the nephew's daughter, naming her, for her life "and to her children in fee simple, if she leaves issue, but if she dies without issue, at her decease, said real estate" and money "shall go to my heirs at law, discharged of all trusts." No conversion of the real estate into personal property was ordered in the will. The nephew's daughter died first after the testator, leaving a husband and a son. son then died, and then the testator's nephew. Held, that the testator intended the property, upon the termination of the two life estates, to go absolutely to the children of the nephew's daughter, if she had any, and that it was only upon her death without issue then living that the alternative limitation to the testator's heirs was to take effect, and therefore that upon her death the entire beneficial interest in remainder vested absolutely in her son, and upon his death it passed to his father. O'Brien v. Lewis, 515.

Annuity.

7. A bequest of \$75,000 to trustees "to be used to purchase an annuity or annuities for C., my niece, the payments thereof to be paid to her quarterly, if that can be done," gives the niece the right to receive the money outright and to require that no annuity shall be bought. Parker v. Cobe, 260.

Devise and Legacy (continued).

8. Where there is a bequest of a sum of money to trustees "to be used to purchase an annuity" for a certain person, and the beneficiary requires that the money shall be paid to him outright without the purchase of an annuity, interest on the amount of the bequest should be paid to the beneficiary from the expiration of one year from the death of the testator. Parker v. Cobe, 260.

Power.

9. A testatrix, who died in 1859 leaving a son and two daughters, G., who then had a son and two daughters, and R., a spinster, by her will left one third of her estate to her son for life with power to appoint such third "among my lineal heirs [meaning descendants], to have and enjoy the same upon such terms" as the son might prescribe. The testatrix's son died in 1875 and by his will appointed the estate in question to trustees for G. and R. during their respective lives, and, in case of the death of G. before R., to divide G.'s shares into as many portions as she had children at the date of the will making the appointment and also at the time of the son's death, to pay one third of such portion to a son of G. outright, and to pay to her two daughters respectively the income of their shares during their lives and on their deaths to pay the principal to and among such daughters' children and the issue of any deceased child by right of representation. A similar appointment to G.'s children and their issue was made of R.'s share on her death. S., one of G.'s daughters, at the time of the death of the testatrix's son had one child and later, by a subsequent marriage, had eight more children. Upon the death of S. the trustees under the appointing will filed a bill for instructions, and it was held that the will of the son of the testatrix operated as an effectual appointment of one third of the estate which was subject to the power to the nine children of S. Leverett v. Rivers, 241.

Codicil referring to and incorporating Part of Will.

10. A testator by his will gave to one S. certain real estate and a certain sum of money in trust to pay the income to the testator's nephew Z. during his life and then to a designated daughter of the nephew and after her death to her children in fee if she should leave issue, but if she should die without issue, then to the testator's heirs at law, discharged of all trusts. There was no other trust provision in the will. By a codicil the testator divided the residue of his estate into three equal parts and as to one part gave this direction: "to my nephew Z. one part—subject to the same trusteeship and conditions as stated in my will." Held, that the effect of the quoted language in the codicil was to incorporate into the direction as to the residuary estate in the codicil the limitations of successive equitable estates set out explicitly in the will. O'Brien v. Lewis, 515.

Rule against Perpetuities.

11. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the

TRUST, 3-6.

account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive a one seventh undivided interest in the business "provided that if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." Held, that the clause was not void as contrary to the rule against perpetuities. Hale v. Herring, 319. Other questions determined as to rights of parties under such trust, see

Separation of Property devised in Trust without Order for Equitable Conversion.

12. A testator by his will gave real estate and personal property in trust to pay the income thereof to a nephew during his life and after his death to the nephew's daughter, naming her, for her life "and to her children in fee simple, if she leaves issue, but if she dies without issue, at her decease, said real estate" and money "shall go to my heirs at law, discharged of all trusts." No conversion of the real estate into personal property was ordered in the will. The nephew's daughter died first after the testator, leaving a husband, and a son who died when less than seven years old leaving his father surviving him. The trustee turned all the real estate into money and invested it, partly in other real estate and partly in personal property. The testator's nephew then died, and, an administrator of the estate of the son of the nephew's daughter having been appointed, the trustee sought instructions as to the final disposition of the trust fund. It having been held, that on the death of the nephew's daughter an absolute interest in remainder in the trust fund became vested in her son, it further was held that, a conversion of the real estate into personalty not having been ordered by the testator, each kind of property in the trust fund should be treated as retaining its original character until it should come into the hands of one entitled to treat it as his own absolutely and for all purposes; and therefore that such of the trust fund as represented proceeds of what at the death of the testator was real estate should be transferred to the husband of the nephew's daughter absolutely, and such of it as was the proceeds of personal property should be transferred to the administrator of her son's estate. It however was intimated that, since the husband was at the same time the heir at law and the sole next of kin of the son, and the son had died at so tender an age, the whole fund might safely have been paid to the husband had no administration been taken upon the son's estate. O'Brien v. Lewis, 515.

Interest.

Certain bequest of sum to trustees to purchase annuity for niece of testator was held to give niece right to receive money outright and to interest from expiration of one year from death of testator, see ante, 7, 8.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. Twenty-seven sea shore lots on or near the waters of Vineyard Sound, which belonged to a deceased husband, consisting of land which formerly was part of a pasture used for pasturing cattle during the summer months, and which, except for sale as cottage lots to be occupied during the summer season, have little value and are not productive of much, if any, income, can be set off as dower to the widow of the deceased and can be occupied and improved by her without committing waste, because they are not wild land in which she could not be entitled to dower within the meaning of R. L. c. 182, § 3. Goodspeed v. Lawrence, 258.

EASEMENT.

1. An owner of real estate, in the absence of an express grant or covenant to that effect, has no right to have the adjacent land remain open for the admission of light and air. Accordingly, where the owner of such adjacent land has consented to the erection upon or over his land of a bridge or structure above and across a street connecting opposite buildings, this obstruction of light and air in the right of such consenting owner as well as with authority from the Legislature impairs no property right of the owners of the adjacent lands. Opinion of the Justices, 608.

Private right of way, see WAY, 1, 2.

Power of Legislature regarding bridges or structures above streets or highways, and rights under certain circumstances of owners of adjacent land, see Constitutional Law, 2, 6, 7; Way, 8; ante, 1.

ELECTION.

Bringing of action for compensation for making of six pencil drawings, which was held to constitute complete election of remedy based on affirmation of contract, and after judgment for defendant therein, to preclude plaintiff from disaffirming contract, claiming right to rescind it, and seeking right of recovery upon quantum meruit, see Practice, Civil, 6.

EMINENT DOMAIN.

Constitutional power of Legislature to erect bridge or structure above street or highway, and limitations thereof under certain circumstances, see Constitutional Law, 2, 6, 7; Way, 8; Easement, 1.

EMPLOYER'S LIABILITY.

See NEGLIGENCE, 1-28.

EMPLOYERS' LIABILITY ACT.

Sugar barrels, temporarily piled at side of passageway in grocery, were held not to be part of ways of proprietor of grocery within St. 1909, c. 514, § 127, cl. 1, see Negligence, 2.

EQUITABLE CONVERSION.

Separation of property devised to trustee without order for equitable conversion, see Drvise and Legacy, 12.

EQUITY JURISDICTION.

Res judicata.

- A finding of fact or a ruling of law as to the meaning of a provision in a
 will, made by a justice hearing a suit in equity and stated in a memorandum of his findings, does not become res judicata unless such finding or
 ruling is embodied in a decree. Leverett v. Rivers, 241.
- 2. The determination, in a suit by the heirs of a certain woman against her husband seeking to annul for fraud the adoption by the woman of her husband's son by a former marriage, of the question, whether the adoption was procured by fraud and was void, by a final decree so declaring, renders that question res judicata in a suit by the husband on his own behalf and as administrator of his son's estate against trustees who held property for the benefit of the heirs of the woman, in which the plaintiff contends that he is entitled to the property because the adoption was not void. Chase v. Phillips, 245.
- Decree pro confesso in suit in equity in another State against Massachusetts fraternal beneficiary corporation among other defendants, declaring that consolidation, with corporation of such State, of Massachusetts fraternal beneficiary corporation was ultra vires, is not res judicata as to Massachusetts corporation if such corporation was not served with process except by publication in accordance with laws of such State, see Res Judicata, 1.

Submission to Jurisdiction.

Neither assessors nor collector of taxes of city or town nor inhabitants of town nor city council of city have power to consent to proceedings in equity to determine validity of tax assessed by assessors of town or city, see MUNICIPAL CORPORATIONS, 2, 3.

For Specific Performance of Contracts.

8. If one has agreed in writing to purchase certain land and to receive a quitclaim deed thereof, "conveying a good and clear title to the same free from all incumbrances, excepting restrictions of record, if any now in force and applicable, and taxes" for the current year, it is no defense to a

- suit in equity against him for specific performance of the agreement that he insisted upon a title which the owner's attorney would absolutely guarantee never would cause him trouble and that such guaranty was refused, since equity requires him to accept a title which is good only beyond a reasonable doubt. Close v. Martin, 236.
- 4. In a suit in equity to enforce specific performance of an agreement in writing whereby the defendant agreed to purchase certain land from the plaintiff, the following facts appeared: On an April 7 the owner of two parcels of land, one of which was the land in question, gave a bond conditioned upon the conveyance of the two parcels for \$7,000, of which \$2,000 was to be paid on the execution of the bond and \$5,000 was to be paid by the obligee's assuming an outstanding mortgage on the land, "the deed to be delivered within sixty days" from the date of the bond. It also was provided in the bond that the obligor reserved the right "to convey the premises to any person other than the obligee upon payment to him of the said sum of \$2,000 with interest . . . at any time within sixty days from the date of the bond." The parcel not in question was conveyed to the obligee by a deed dated the twenty-seventh of the same month, which was not recorded until the following August 9. On August 6 of the same year, by a deed recorded on the twentieth of that month, the parcel in question was conveyed to a predecessor in the title of the plaintiff. The defendant contended that a defect in the title appeared in that the record did not show that the condition of the bond had been performed and that therefore he was warranted in refusing to perform his agreement. Held, that there was no defect, since the bond did not affect the obligor's right to convey the land away, but was merely an agreement to pay back the \$2,000, which had been paid on the execution of the bond, in case the obligor conveyed both parcels of land under the right reserved to him in the deed. Ibid.
- Suit in equity for specific performance of contract to sell land which was dismissed both because, it was held, no contract of sale had been consummated and because no memorandum of sale sufficient to satisfy statute of frauds had been made, see CONTRACT, 7; FRAUDS, STATUTE OF, 2.

For an Accounting.

- 5. In a suit in equity by the owner of a vessel or by his trustee in bank-ruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the mortgage, which is found to have been fraudulent and void, and have repaired and made use of the vessel at a good profit, the defendants must be charged with the net amounts which they have received as the earnings of the vessel or which by the exercise of due diligence they ought to have received. Clark v. Story, 36.
- 6. In a suit in equity by the owner of a vessel or by his trustee in bank-ruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the mortgage, which is found to have been fraudulent and void, and repaired

and made use of the vessel at a good profit, and who consequently are charged with the net amounts which they have received as the earnings of the vessel, if it is shown that one of the defendants rendered services in connection with the use of the vessel, which resulted in very successful voyages and very large earnings, and that a fair compensation for such services would be \$500, such defendant is entitled to be credited with that amount, and is not to be deprived of it on the ground that he should not be allowed to profit by his wrongdoing, because the avoidance of the foreclosure does away with the effect of the fraud and the defendants are to be treated as mortgagees in possession, whose duty it was to put the vessel to a valuable use, and there is no reason why the plaintiff should take without compensation the benefit of the valuable services of the defendant which produced an advantageous result for the plaintiff's benefit Clark v. Story, 36.

- 7. In a suit in equity by the owner of a vessel or by his trustee in bankruptcy, for an accounting, against the assignees of a mortgage on the vessel who had taken possession of her under an assumed foreclosure of the
 mortgage, which is found to have been fraudulent and void, and repaired
 and made use of the vessel at a good profit, and who consequently are
 charged with the net amounts which they have received as the earnings of
 the vessel, the defendants are not to be allowed for premiums paid for insurance, a part of which was upon another vessel, as the premiums for
 insurance, even on the vessel in question, constituted no part of the mortgage debt and were not paid under any provision of the mortgage, but
 were wholly independent matters. *Ibid*.
- 8. If the surviving members of a copartnership, to whom a chemist had entrusted certain formulas in the nature of trade secrets under a contract whereby the copartnership was to manufacture and sell compounds made from the formulas and share the profits with the chemist, form a corporation of which they are the president, treasurer, a majority of the board of directors and the owners of the controlling shares of the capital stock, and then convey the formulas to the corporation which continues to use them without accounting to the chemist for profits actually realized, the corporation receives the formulas and uses them with full knowledge of the breach of trust of the copartnership and must be held to hold and to use them subject to the same trust under which they were held by the copartnership; and therefore after the death of the chemist, the administrator of his estate may maintain a bill in equity to compel the corporation to account for the chemist's share of the net profits realized by the corporation in his lifetime. Noble v. Joseph Burnett Co. 75.
- 9. A bill in equity, by the administrator of the estate of a chemist against the surviving members of a certain copartnership, alleged that the chemist made a contract with the copartnership by the provisions of which the chemist was to devote his time and skill to producing formulas of a certain kind "for the mutual benefit of himself and said copartnership" and to permit the copartnership to make use of the formulas for manufacturing purposes, and the copartnership was to manufacture and put upon the market compounds made in accordance with such of the formulas as they

believed capable of yielding a profit and to pay the chemist "a fair and equitable share of the net profits"; that the chemist performed his part of the contract, and that, although there were large profits realized from the enterprise by the copartnership, the defendants refused to account therefor to the plaintiff; that an accounting would be an extremely complicated and difficult matter and that the common law would afford no adequate and complete relief. There was a prayer for an accounting and for an order for a payment to the plaintiff of what was due him as administrator. The defendants demurred to the bill. Held, that there was nothing to show that the rule for ascertaining the chemist's share of the net profits, "a fair and equitable share," was so indefinite or that its application was so impracticable that it could not be applied with reasonable certainty to the circumstances under which the profits were made; and that equity had jurisdiction to compel the defendants to account, irrespective of the question whether under the contract the chemist and the copartnership became partners. Noble v. Joseph Burnett Co. 75.

- 10. A bill in equity, by the administrator of the estate of a chemist against the surviving members of a copartnership and a corporation, alleged in substance that the chemist had made a contract with the copartnership by which he entrusted to them certain formulas under an agreement that they should manufacture and sell compounds made from such formulas and should divide with him the net profits thereof, that the copartnership realized profits but did not account to the chemist, denying that there were any profits, that, one of the copartnership having died, the individual defendants, who were the surviving partners, formed the defendant corporation, they being its president, treasurer, a majority of its board of directors and the owners of the controlling interest of the capital stock, that the individual defendants as surviving copartners conveyed the formulas to the corporation, which used them and realized profits, but refused to account to the chemist or to the plaintiff. The prayers of the bill were for an accounting, injunctions against the divulging of the formulas, a determination of the plaintiff's rights as to the formulas and a decree that the corporation be required to recognize those rights. Held, that the bill was not multifarious, the fundamental question being the interest of the chemist in the formulas and all the defendants being interested directly in that question. Ibid.
- 11. In a suit in equity for an accounting, brought by the owner of certain real estate, which he had put in the hands of the defendant for management and sale, where the plaintiff contends that an item of a certain amount, which was charged in the defendant's account as paid to the plaintiff, was so charged improperly and that the defendant should not be credited with it, the burden is not on the plaintiff to prove that the amount was credited to the defendant improperly, but is on the defendant to account for the money or property of the plaintiff that had come into his hands. Little v. Phipps, 881.

In suit for accounting by principal against agent, taking of secret profit by agent was held to preclude him from benefits of agreement as to division of profits, see Agency, 2-4.

Multiplicity of Interests.

12. Even if exclusive remedies had not been given by statute for contesting the amount and determining the validity of taxes, it is at least very doubtful whether a bill in equity could be maintained under R. L. c. 159, § 3, cl. 3, on the ground of multiplicity of interests which cannot be justly and definitely decided and adjusted in one action at law, to determine whether personal property belonging to the estate of a testator was assessable for taxation in the hands of the executors of his will in the city of his domicil, or whether it had passed to the trustees under the will and was assessable in another city and two towns, where different beneficiaries lived. Welch v. Boston, 326.

To enjoin Unlawful Interference with Contracts.

18. A suit in equity may be maintained to enjoin the defendants from unlawfully interfering with the plaintiff's business by inducing persons under contract with the plaintiff for future service to break their contracts. Folsom v. Lewis, 336.

Such suit maintained against members of labor union, see LABOR AND LABOR UNION, 3.

To reach and apply Equitable Assets.

- 14. If one makes a conveyance of his property with the intent of hindering, delaying or defrauding future as well as existing creditors, the property so conveyed may be reached by one, who afterwards becomes a creditor, in satisfaction of his debt although the conveyance itself did not render the debtor insolvent. Burke v. Dorey, 45.
- 15. A suit in equity, to reach and apply in satisfaction of a debt due to the plaintiff property which the principal defendant was alleged to have conveyed fraudulently to a second defendant for the purpose of avoiding attachment by creditors, was referred to a master. The defendants con tended that the conveyance was made in good faith to secure the second defendant for advances made by him for the first defendant. In his report the master without reporting the evidence found that the property had been conveyed fraudulently as alleged, and also found that the second defendant had paid certain obligations of the principal defendant and had given a bond to dissolve an injunction issued in another suit in equity against the principal defendant. He also refused to believe certain testimony as to obligations of the principal defendant to the second defendant and documentary evidence with regard thereto. The defendant excepted to the report on the ground that the findings of the master that the conveyance was fraudulent and that the second defendant paid out money for the principal defendant were inconsistent. Held, that the exception must be overruled because for ought that appeared the master might have found that the payments by the second defendant for the first, referred to in the report, were made pursuant to and in furtherance of the alleged fraud, which finding could not be said to have been wrong as matter of law. Ibid.

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16. One, who sought the services of an attorney at law, at the attorney's request gave him a demand note for \$2,500 bearing semiannual interest and the attorney gave back a receipt stating that the note was received "for retainer, for services rendered and to be rendered" in a certain equity suit then pending, which the attorney agreed "to press... for final hearing as rapidly as possible and to make no compromise of any sort... without the assent of" the client. Thereafter the attorney "proceeded in the suit as rapidly as possible and with due fidelity." In less than six months after the date of the note and before the equity suit was brought to a final hearing, the attorney brought a suit in equity seeking to reach and apply in payment of the note certain property of the client which he alleged had been conveyed to another to avoid attachment by the client's creditors. Held, that such suit by the attorney was not brought prematurely. Burks v. Dorey, 45.

To enforce Resulting Trust.

Suit in equity, to enforce resulting trust alleged to have arisen from fraudulent act of defendant in purchasing land with plaintiff's consent and by use of plaintiff's money and then refusing to recognize rights of plaintiff therein, was dismissed because money furnished by plaintiff comprised only part of purchase price of land, and no resulting trust arose, see Trust, 7.

To redeem from Mortgage.

Suit in equity by trustee in bankruptcy of owner of vessel against assignees of mortgage of vessel, who had taken possession of her under assumed foreclosure which was fraudulent and void, in which plaintiff sought accounting and redemption, see ante, 5-7.

Mandatory Injunction.

Suit in equity where mandatory injunction, to compel enforcement of technical right of plaintiff to have removed certain structures which were slight infringements of easement, was refused and plaintiff was held to have only legal right to nominal damages, see WAY, 2.

To enforce Bond given under Pub. Sts. c. 16, § 64, now R. L. c. 6, § 77.

17. At a former stage of this case it was decided, as reported in 202 Mass. 326, that the plaintiff who furnished for a contractor labor and materials used for the construction of an aqueduct under a contract made for the Commonwealth by a public board, could enforce for his benefit the bond given by the contractor to the Commonwealth in compliance with the requirement of Pub. Sts. c. 16, § 64, now R. L. c. 6, § 77. 'After the filing of the bill in equity upon which that decision was rendered the Commonwealth paid to the plaintiff and others, from the funds in its hands reserved by it from moneys due to the contractors, thirty-five per cent of their respective claims against the contractors, and the contractors assented to these payments. Upon receiving the payment made to him, the

plaintiff, with the assent of the surety, released the Commonwealth. plaintiff applied about half of the money thus received from the Commonwealth to paying for powder which had been used in blasting for the public work, for which the plaintiff was entitled to have the liability of the surety on the bond of the contractor enforced. The rest of the money so received from the Commonwealth the plaintiff applied in paying for fittings of machinery, tools and other supplies, for which the surety on the bond of the contractor was not liable, all of the claims thus discharged having been filed in the office of the board which made the contract for the public work. The surety contended that the whole of the money received from the Commonwealth should be applied toward the payment of the bill for powder and thus reduce the surety's liability to that extent. Held, that, there having been no agreement between the parties as to the application of the money, the plaintiff could apply the payment as he saw fit, and the fact that the surety was liable only on a part of the plaintiff's claim against the contractor did not give the surety the right to have the whole of the money received by the plaintiff applied to that portion of the plaintiff's claim. George H. Sampson Co. v. Commonwealth, 372.

Taxes Illegally assessed.

18. In this Commonwealth, where the remedies given by statute for contesting the amount and determining the validity of taxes are exclusive, equity will not interfere to determine the validity of a tax. Welch v. Boston, 326.

Bill of Interpleader.

19. Even if exclusive remedies had not been given by statute for contesting the amount and determining the validity of taxes, a bill of interpleader would not lie to determine whether personal property belonging to the estate of a testator was assessable for taxation in the hands of the executors of his will in the city of his domicil or whether it had passed to the trustees under the will and was assessable in another city and two towns, where different beneficiaries lived and where a tax upon their respective interests in the property had been assessed. Welch v. Boston, 326.

Damages.

Suit in equity where mandatory injunction, to compel enforcement of technical right of plaintiff to have removed certain structures which were slight infringements of easement, was refused and plaintiff was held to have only legal right to nominal damages, see WAY, 2.

EQUITY PLEADING AND PRACTICE.

Premature Suit.

Suit by attorney at law to reach and apply, in satisfaction of debt alleged to be due from client according to special contract for services rendered and to be rendered, property, alleged to have been conveyed by client Equity Pleading and Practice (continued).

with intent to hinder, defeat and defraud creditors, was not prematurely brought although services had not been fully rendered, see Equity Jurisdiction, 16.

Parties.

1. In a suit in equity by the executors of a will for instructions as to a bequest of a sum of money to them as trustees "to be used to purchase an annuity" for a certain person, where the beneficiary has demanded that the money shall be paid to him outright without the purchase of an annuity, and he is entitled to have this done, and where it affirmatively appears that no question is made as to the interest to be computed upon the sum to be paid to the beneficiary, the residuary legatees under the will have no possible interest in the matter passed upon and there is no occasion for making them parties defendant. Parker v. Cobe, 260.

Bill.

Bill in equity by administrator of estate of chemist, who had delivered certain secret formulas to partnership for manufacturing and selling purposes subject to agreement to pay him "fair and equitable share" of net profits of enterprise, against surviving members of partnership and against corporation into which partnership had formed itself and which had continued use of formulas for same purposes, was not multifarious because it sought not only accounting but also injunction against divulging of formulas and determination of plaintiff's rights and decree directing corporation to recognize such rights, see Equity Jurisdiction, 10.

Master's Report.

- Where a report of a master, to whom a suit in equity was referred, does
 not contain a report of the evidence, an appeal from a decree overruling
 exceptions to findings of fact by the master cannot be considered. Burke
 v. Dorey, 45.
- 3. In a suit in equity a finding of a master on a question of fact cannot be revised unless the evidence on which the finding was made is reported or described in his report. Little v. Phipps, 331.
- 4. In a suit in equity, where the case has been referred to a master under an order in the usual form and the master has filed a report in which he finds that the allegations of the bill relied upon by the plaintiff as the ground for relief are not true and does not report the evidence, and no exceptions are taken to the master's report, the only action possible for the judge who hears the case is to make a decree that the bill be dismissed. O'Brien v. Gove. 825.

Appeal.

Appeal from decree overruling exceptions to findings of fact by master cannot be considered when report of master does not contain report of evidence, see ante, 2.

ESTOPPEL.

Where at trial party calls adverse party as witness and proceeds to cross-examine him as permitted by R. L. c. 175, § 22, regulation and scope of cross-examination and order of evidence are subject to discretion of judge, and evidence may afterward be introduced by examining party to contradict testimony thus elicited, see WITNESS, 1; EVIDENCE, 18.

Mortgagee of real estate is not estopped, by recital in affidavit of sale at foreclosure that property was sold for \$12,500, from showing, in action upon note for balance alleged still to be due, that property was sold for \$10,000, see Mortgage, 3.

Person, who has been arrested without warrant for drunkenness and after he has recovered from intoxication has made statement in writing and request for release under provisions of St. 1905, c. 384, and has been released, cannot recover from officer who arrested him, or from person who assisted officer or from carrier of passengers whose agent person who assisted officer was, see False Imprisonment, 1; Waiver, 1; Joint Tortfeasors, 1; Carrier, 1.

Validity of appointment of administrator, where court had power to make appointment, cannot be questioned in action by administrator to recover money in hands of another, see PROBATE COURT, 2.

EVIDENCE.

Presumptions and Burden of Proof.

- A jury are not bound to believe evidence merely because it is uncontradicted. Hutchinson v. Converse, 97.
- The fact that a jury have a right to disbelieve certain testimony does
 not make such disbelief affirmative evidence to the contrary, its only result being to eliminate the testimony disbelieved. Hyslop v. Boston &
 Maine Railroad, 862.
- 3. If the plaintiff is the only witness in his own behalf at the trial of an action and the facts testified to by him in direct examination will warrant the submission of the case to the jury, statements made by him in cross-examination which are in some respects in conflict with those made in direct examination will not prevent the case being so submitted, such a conflict being simply a matter for the jury to weigh. McCarthy v. Boston Elevated Railway, 512.

Applications of doctrine, res ipsa loquitur, see Negligence, 86, 87, 68.

Effect of auditor's report as evidence, see PRACTICE, CIVIL, 7.

Verdict was properly ordered in action for rent under lease where execution and delivery of lease were admitted and no just ground for refusal to pay rent appeared, see LANDLORD AND TENANT, 4.

Validity of appointment of administrator, where court had jurisdiction to make appointment, cannot be questioned in action by administrator to recover money in hands of another, see PROBATE COURT, 2.

- Refusal, by judge presiding at trial of action for price of goods sold, to order verdict for defendant where only question was, whether price was payable in money or in goods, and evidence was conflicting, was held to be correct, see Sale, 12.
- Burden, of proving that all representations made by insured in application for life insurance were true, is not upon plaintiff in action upon policy in this Commonwealth, and request for rulings based upon such proposition of law properly was refused, see INSURANCE, 1.
- In action by tradesman for price of goods, conduct of tradesman, in charging goods, furnished to third person on original promise of defendant to pay for them, on his books under name of third person, is merely admission of tradesman to be considered with other evidence, and judge need not charge jury that such conduct is *prima facie* evidence against him, see CONTRACT, 2.
- Requests, by defendant in action against insurance company upon policy of insurance, for rulings that plaintiff had not made to defendant proper proof of death of insured and was not entitled to recover, were held rightly to have been refused because questions, whether contract of insurance had been performed and proper proof of death made, were for jury, see Insurance, 4, 6.
- Unless contrary is shown, it must be assumed upon exception to ruling of judge presiding at trial admitting certain evidence as declaration of deceased person under R. L. c. 175, § 66, that judge made all findings necessary to qualify evidence under statute, see PRACTICE, CIVIL, 43.
- Where bill of exceptions states only that on day of entry of writ in court ad damnum of writ was increased "by agreement of counsel," yet, if statement of increase appears as one of docket entries in certified copy of record of court, it will be assumed that such amendment by agreement received approval of court, see Practice, Civil, 5.
- A presiding judge properly may refuse to rule upon certain uncontroverted facts picked out from evidence when disputed facts also are material, see PRACTICE, CIVIL, 16.
- When gross or wilful negligence of person injured or killed at grade crossing of railroad with highway is defense to action against railroad company under St. 1906, c. 463, Part II. § 245, and whether in certain case verdict should have been ordered for defendant on ground that such defense was made out, see Railroad, 2-5.
- Verdict should not be ordered for defendant if there is some evidence which, if believed, would warrant verdict for plaintiff, although judge might set aside verdict because of character of evidence if verdict was returned for plaintiff, see PRACTICE, CIVIL, 24.
- One who is invited or seeks to make contract with municipal corporation is chargeable with knowledge of extent of or lack of authority of corporation and its various officers to make such contract, see MUNICIPAL CORPORATIONS. 1.
- Provision, in proposed statute making employment of any one upon public work for more than eight hours each day a criminal offense, that working more than eight hours in any one day shall be prima facie evidence of

Evidence (continued).

violation of statute, would be unconstitutional, see Constitutional Law, 10.

By common law in this Commonwealth, mere fact that fire which destroyed property was started by spark from locomotive engine is not prima facise evidence of negligence of company operating engine, see Negligence, 64.

Burden, in action for balance remaining due on mortgage note after foreclosure sale, of proving allegation in answer of mortgagor that sale was fraudulent is upon mortgagor, see MORTGAGE, 1.

In suit by principal against agent for accounting, where plaintiff contends that certain item of credit to defendant, stated in account rendered to principal by defendant, was incorrect, burden is not upon plaintiff to establish contention, but is upon defendant to account properly, see Equity Jurisdiction, 11.

In action against insurance company upon policy of life insurance which was lost, where defendant introduced in evidence what it contended was insured's original application for insurance and copy of policy which it contended was issued to insured and had attached to it copy of such application, and plaintiff's evidence tended to controvert that of defendant both as to there having been any copy of application attached to policy and as to accuracy of alleged copy of policy, presiding judge may refuse requests for rulings based on statements in application and on assumption that copy of application was attached to policy, because question whether copy of application was attached to policy was for jury, see Insurance, 5.

Admissions and Confessions.

To what extent, at trial of indictment against several jointly for conspiracy to bribe, admissions by one defendant are evidence, see CONSPIRACY, 2.

Absence of material witness as evidence against party who should have called him, see post, 19.

Certain evidence which was held to have been admissible at trial of two jointly indicted for murder, as to words and conduct of one of two defendants when other defendant in his presence made confession, see HOMICIDE, 2.

Whether cumulative evidence shall be received upon point which has been admitted by adverse party, is within discretion of judge presiding at trial, see Practice, Civil, 12.

In action by tradesman for price of goods, conduct of tradesman, in charging goods, furnished to third person on original promise of defendant to pay for them, on his books under name of third person, is merely admission of tradesman to be considered with other evidence, and judge need not charge jury that such conduct is *prima facie* evidence against him, see CONTRACT, 2.

Admission, by defendant in criminal case, by conduct in keeping silence while compromising statement was being made by his private secretary in his presence, which was held to have been introduced in evidence properly, see Conspiracy, 3.

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Against Different Defendants indicted Jointly.

To what extent, at trial of indictment against several jointly for conspiracy to bribe, admissions by one defendant are evidence, see Conspiracy, 2.

Extrinsic affecting Writings.

Certain order in writing which was held not to be mere bill of parcels but to be contract in writing without ambiguity, which could not be varied or explained by oral evidence, see CONTRACT, 10.

Unambiguous lease in writing was held not to be affected by conversation between tenant and landlord's agent which took place before execution of lease, see LANDLORD AND TEMANT, 1.

Best and Secondary.

- 4. It is at least doubtful whether action of the board of directors of a business corporation at a meeting, of which a record was kept, can be proved by oral evidence, per Knowlton, C. J. Chase v. New York Central & Hudson River Railroad, 137.
- Opinion of officer of corporation as to whether certain acts of directors and officers of corporation constituted sale of automobile, was held not competent where documents and records themselves were in evidence, see post, 9.

Competency.

- Opinion of officer of corporation as to whether certain acts of directors and officers of corporation constituted sale of automobile, was held not competent where documents and records themselves were in evidence, see post, 9.
- Evidence, that one who was officer of two corporations, authorized to act for each in carrying out sale from one to other, handed bill of sale to book-keeper with directions to keep it for certain time, is not competent to contradict import of documents and records which showed completed sale, see Sale, 2.

Remoteness.

5. Where at a trial of an action for personal injuries, conditions of temperature, cloudiness and snow fall at the place of the accident are material issues, and evidence is offered of observations thereof taken at a distance from the accident, it is for the presiding judge to determine whether the observations were so near in time and place and the climatic conditions were sufficiently similar to make the observations, admissible as evidence, and the admission of observations taken five miles from the place of the accident and at a place six hundred feet higher is not an improper exercise of discretion. Nelson v. Old Colóny Street Railway, 159.

Relevancy and Materiality.

- 6. At the trial of an action against a husband and wife on certain promissory notes purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures offered by the plaintiff and admitted by the presiding justice as standards also were not in the wife's ordinary handwriting. The plaintiff introduced evidence tending to show that the signatures of the notes sued upon and of the standards were in the handwriting of a woman. It appeared that immediately after the notes sued upon were given the wife and her husband went to Europe. The wife offered to show by the testimony of her daughter in law that after the return of the wife and her husband from Europe the husband asked the witness to sign the name of his wife in a disguised handwriting to a subscription upon rights for shares of stock and that the witness refused to do it. The presiding justice excluded the evidence. Held, that the exclusion could not be said to be erroneous, because the justice well might have found that this was an independent fraud and have ruled on that ground that evidence of it was not admissible. Newton Centre Trust Co. v. Stuart, 221.
- 7. At the trial of an action against a husband and wife on certain promissory notes purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures about sixty in number offered by the plaintiff and admitted by the trial justice as standards also were not in the wife's ordinary handwriting. The wife testified that her father had wished her not to dispose of any property that he had given to her. The trial justice admitted evidence offered by the plaintiff to the effect that it had been arranged between the wife and her father that all the dividends from certain shares of railroad stock which her father had given to her should be sent to her in care of her father, in order that he might see that she had not sold the shares, that every quarter immediately after the payment of the dividend she sold these shares and immediately before the next dividend accrued she bought them back again with borrowed money, giving directions to have the dividends sent to her father, who then handed them to her. The plaintiff offered this evidence as showing a part of a scheme to conceal the wife's financial transactions from her father, which the plaintiff relied upon to explain why her signatures to the notes sued upon and those put in evidence by him as standards were not in the wife's ordinary handwriting. Held, that this evidence, although not admissible to show that the husband was his wife's general agent,

was admissible for the purpose for which it was offered and admitted. Newton Centre Trust Co. v. Stuart, 221.

8. At the trial of an action against a husband and wife on certain promissory notes, amounting to \$32,000, purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. The signatures on the notes sued upon purporting to be those of the wife were not in her ordinary handwriting and other signatures offered by the plaintiff and admitted by the presiding justice as standards also were not in the wife's ordinary handwriting. The plaintiff contended that the wife used a feigned signature to keep from her father the fact that she was signing the notes. At the time that the notes sued upon were given the husband made an adjustment of transactions with the person to whom the notes sued upon were given for the sum of \$32,000 represented by them, and immediately after this adjustment the wife and her husband went to Europe. It appeared that about that time the husband had given to the same person sixty-seven notes purporting to be signed by his wife to the amount of over \$277,000, and it could have been found that the notes sued upon were among these. The wife testified that she never signed any of these notes and that her husband had forged her name upon them or had procured some one to do so. The wife offered to show by the testimony of her daughter in law that when she returned with her husband from Europe the husband asked the witness to keep from his wife any message or messages in regard to any promissory notes, and made other requests of a similar character, indicating a desire on his part that his wife "should not be informed of anything in connection with promissory notes." The presiding justice excluded the evidence, and after a verdict for the plaintiff the wife alleged exceptions. Held, that the exclusion was erroneous, because the jury might have found that the request of the husband to his wife's daughter in law had reference to the sixty-seven notes purporting to have been signed by his wife and had reference to some if not all of the notes sued upon, and this fact, if they should find it, was a material one which should be considered by the jury. Ibid.

Where, at trial of action for price of goods sold, sale and price agreed upon are admitted, and only question is, whether payment was to be in other goods of defendant or in money, evidence, that before sale defendant offered price less than that which he ultimately agreed upon, is immaterial see SALE, 18.

In action for price of goods sold, where only question is, whether price was to be paid in money or in other goods of defendant, and judge instructed jury that, if it was to be paid in other goods of defendant, plaintiff could not recover, defendant is not harmed by exclusion of evidence as to prices for which he was selling own goods, see Sale, 14.

Evidence as to habitual use by travellers of street railway tracks on icy hill street, which was held to be admissible in action by traveller there who was injured by being run into by street railway car, see Negligence, 29.

- Certain evidence, which was held to be admissible at trial of action by agent for commission for sale of merchandise which was not delivered, to explain why on former occasions when such sales were made and merchandise was not delivered, plaintiff did not claim commissions, see Agency, 5, 6.
- Certain testimony of agent for purchaser of lot of mackerel, which was held to be admissible, at trial of action by purchaser against seller for damages due to some of fish being "rusty" and not "clean," to show that agent did not make thorough examination of fish before purchase, see Sale, 10.
- Evidence of established custom of railroad corporation, not to run express trains past station while local train was discharging passengers there, was held to be admissible, in action against railroad corporation under St. 1906, c. 463, Part II. § 245, for death of passenger, on question whether passenger, who had left local train, was guilty of gross or wilful negligence in being upon track where he was struck by express train, see RAILEOAD, 4.

Irrelevant Parts of Admissible Writings.

Exception to admission in evidence of certain letter, part of which is admissible, will not be sustained because another part of it is irrelevant, if excepting party at time letter is offered neither asks that irrelevant part be stricken out nor that jury be instructed to disregard it, see PRACTICE, CIVIL, 45.

Opinion: Experts.

- 9. At the trial of an action in which a material question was the ownership of an automobile which the defendant contended had been sold by one corporation to a second, the plaintiff, who was the president of both corporations, in direct examination testified that the automobile belonged to the second corporation. In rebuttal, he testified that, after an examination of the books and papers of the corporation, he desired to change his testimony as to which corporation owned the automobile. All the books and papers which determined the question were in evidence and were undisputed, and, in the opinion of this court, showed that the automobile belonged to the second corporation. Held, that the testimony in rebuttal, being a mere expression of opinion, was not competent evidence on the question of the title to the automobile, when everything upon which the determination of that question depended was established by evidence from records and undisputed facts. Chase v. New York Central & Hudson River Railroad, 187.
- Opinions of experts as to whether certain cuts on throat of one alleged to have been murdered could have been self inflicted, which was held admissible at trial of persons accused of murder, see Homicide, 1.
- Certain statement of physician to father of insured to effect that he thought insured had consumption at time when policy was taken out, was held not to be competent evidence on question, whether insured was so afflicted, see Insurance, 3.

Opinion of expert that certain stairway in department store was "not regarded as safe" was not admissible in evidence at trial of action by one injured thereon, where architectural features of staircase and conditions under which it was used had been explained, see Negligence, 68.

Declarations of Deceased Persons.

- 10. At the trial of an action against a street railway company for personal injuries alleged to have been received by the plaintiff when leaving a car of the defendant, a letter, bearing a date over seven months before the commencement of the action and written by one to whom as a witness of the accident the defendant had addressed a letter making inquiries regarding the circumstances under which the accident occurred, is admissible in evidence as a declaration of a deceased person under R. L. c. 175, § 66, upon proof of the death of the writer, if the letter bears internal evidence that the answers to the inquiries were made in good faith and upon the personal knowledge of the writer. White v. Boston Elevated Railway, 193.
- 11. A street railway company, within six days after an accident to a passenger, addressed a letter to a certain person stating that his name had been returned to it as a witness of the accident, and asking him to fill out answers to questions on a blank inclosed. The person addressed did as requested and sent the blank, thus filled out, to the company dated the day after that of the company's letter to him. The paper was as follows: "Did you see the accident? Yes. Where did it occur? Near Vine street on Dudley. What day and at what hour did this accident occur? About 6.18 o'clock P. M. on 20th of July. Where were you when it occurred? Sixth seat from the front of car on right hand side. car standing or moving? If moving about how fast? Car was moving about 2 miles an hour. Give full account of accident as witnessed by you. Saw lady signal Conductor he puled bell to stop car was comeing to a stop when lady started to get off conductor said wait until car stops didn't wait but steped off backwards and fell. What is your full name and address? Francis J. Reid, 42 Leonard St., Dorchester, Mass. My Business Address is Dated, July 26th 1905." Seven months later the passenger brought an action against the company, at the trial of which, the witness having died, the defendant offered and the judge admitted the paper in evidence under R. L. c. 175, § 66, as a declaration of a deceased person made in good faith before the commencement of the action and upon the personal knowledge of the declarant. Held, that the action of the judge was warranted. Ibid.
- 12. At the trial of an action against a husband and wife on certain promissory notes, amounting to \$32,000, purporting to be signed and indorsed by both of the defendants, the wife contended that the signatures purporting to be hers on the faces and the backs of the notes were forged by her husband or by some one procured by him, and testified that she knew nothing of them and had received nothing for them. At the time of the trial the father of the wife was dead, and the presiding justice under R. L. c. 175, § 66, allowed the plaintiff to show that the father had said, "That scoun-



drel [meaning the husband] has persuaded her to put her name to over \$100,000 worth of that paper, and I know it because she has told me so." It appeared that at the time that this statement was testified to have been made the husband had given to a certain person notes purporting to have been signed by his wife amounting to \$277,000, but there was no evidence that at the time the wife's father made the statement the amount of notes which had been given by the husband was known and it probably was not known. The presiding justice, in admitting the evidence of the father's declaration, said to the jury that it should not be considered unless the jury found, first, that the wife made the alleged statement to her father, and, second, that she intended the statement to include the notes sued upon. Held, that, thus guarded by the instruction of the presiding justice, there was no error in the admission of the testimony. Newton Centre Trust Co. v. Stuart, 221.

Unless contrary is shown, it must be assumed upon exceptions to ruling of judge presiding at trial admitting certain evidence as declaration of deceased person under R. L. c. 175, § 66, that judge made all findings necessary to qualify evidence under statute, see Practice, Civil, 43.

Of Experiments.

13. At the trial of an action against a street railway company for personal injuries received in a collision between a car of the defendant and a wagon of the plaintiff at 6.30 o'clock in the evening of a January 26, there was evidence that "there was a little moonlight, it was not dark and it was not a clear light," and the presiding judge admitted testimony of a civil engineer, called by the defendant, that between 7.30 and 8 o'clock of the same evening, he had stood in the vestibule of a car approaching the place of the collision from the same direction as had the car which ran into the plaintiff, while a man was stationed at the point where the collision had occurred; that "as he came down hill he first caught sight of the man at a point which, on measuring, he found to be one hundred and thirty feet from the point where the man was standing. The car upon which he was riding had both an incandescent and an oil headlight, which assisted him in seeing. At the time this experiment was made he thought the moon was obscured by the clouds." There was evidence that the car which struck the plaintiff was equipped with an incandescent electric headlight. Held, that the admission of the testimony was not clearly erroneous. Nelson v. Old Colony Street Railway, 159.

Chalks and Models.

- 14. The general rule in regard to the admission of photographs, plans and models is that the question whether they are to be received or not is a preliminary one resting largely in the discretion of the trial judge, the exercise of which will not be revised unless it appears to have been plainly wrong or in violation of some rule of law governing the rights of the parties. Everson v. Casualty Co. of America, 214.
- 15. In an action upon a policy of accident insurance for the loss of the plaintiff's right hand, which was amputated in consequence of its injury

in the burning of a building, where a defense relied upon was that the plaintiff suffered the physical injury voluntarily for the purpose of obtaining the insurance money, the plaintiff testified that he received his injury by reason of his hand being caught under a door, which with its surroundings he described. From the plaintiff's description and from a sketch which the plaintiff had made the defendant had a model prepared, which was set up in the basement of the court house, and the defendant offered to make any change in the model under the plaintiff's direction which was required to make it conform in every detail to the original. A witness testified that the plaintiff had inspected the model and had spent considerable time in examining it and in making full measurements of it, and that the plaintiff had said, in answer to a question from the witness, that the model was practically according to his specifications and was correct except in minor details. The presiding judge viewed the structure without the jury. The plaintiff's counsel objected to the jury being permitted to see it, because the plaintiff, after examining the structure, had stated that it was not a correct representation of the door under which his hand was caught, that it could not be a fair representation unless shown as a part of a house and not as a disconnected object, and that it had not been verified sufficiently. The defendant again offered to correct the structure in any particular which the plaintiff or his counsel might suggest, but no suggestion of correction was made by them. Thereupon the presiding judge permitted the jury to inspect the alleged model, first saying to them, that he was about to let them see something which was alleged to be somewhat similar in structure to what the plaintiff had been telling about, that they might look at it as a chalk, so that they could understand how the plaintiff's evidence applied to the situation, and that the model might help them to understand the evidence. Held, that the action of the judge was a proper exercise of his discretion. Everson v. Casualty Co. of America, 214.

Uncontroverted.

16. A jury are not bound to believe evidence merely because it is uncontradicted. Hutchinson v. Converse, 97.

Presiding judge properly may refuse to rule upon certain uncontroverted facts picked out from evidence when disputed facts also are material, see PRACTICE, CIVIL 16.

Cumulative.

Whether cumulative evidence shall be received upon point which has been admitted by adverse party, is within discretion of judge presiding at trial, see Practice, Cive., 12.

Of Custom.

Evidence of customs in fish trade was admitted, at trial of action for purchase price of lot of mackerel, to show meaning of terms of contract of purchase, see SALE, 6, 7.

Proof of Contents of Lost Instrument.

In action against insurance company upon policy of life insurance which was lost, where defendant introduced in evidence what it contended was insured's original application for insurance and copy of policy which it contended was issued to insured and had attached to it copy of such application, and plaintiff's evidence tended to controvert that of defendant both as to there having been any copy of application attached to policy and as to accuracy of alleged copy of policy, presiding judge may refuse requests for rulings based on statements in application and on assumption that copy of application was attached to policy, because question whether copy of application was attached to policy was question for jury, see Insurance, 5.

Papers produced on Call of Adverse Party.

17. The rule, which has prevailed in this Commonwealth, that, if at a trial a paper is called for and is inspected after having been produced by the adverse party, it can be used as evidence by the party producing it, does not make such a paper evidence for the party calling for it and inspecting it, and it cannot be put in evidence by that party unless it is otherwise admissible. Boyle v. Boston Elevated Railway, 41.

In Rebuttal.

18. Where a plaintiff calls the defendant as a witness and cross-examines him as permitted by R. L. c. 175, § 22, this does not estop him from introducing evidence in rebuttal to contradict the testimony of the defendant which he elicited in the cross-examination. Cobb, Bates & Yerxa Co. v. Hills, 270.

Failure to call Material Witness.

19. In an action against three trustees, for the price of coal alleged to have been delivered at a building owned by the defendants, where the defendants denied that the coal was ordered or was delivered, the plaintiff testified that he had sold coal to the defendants before on an order given by F, who was one of the defendants, and that he was sure that F had ordered the coal for the defendants although he knew that F was also a trustee of another real estate association in the same town. The defendants did not call F as a witness, and the judge in the course of his charge instructed the jury that if they thought that F should have been produced as a witness by the defendants they could give such weight as they thought fit to the fact that he had not been produced. Held, that there was no error in this instruction. Stewart v. Fuller, 359.

EXCEPTIONS.

In actions at law, see Practice, Civil, 5, 8, 10, 15, 22, 28-47; Mortgage, 2; Sale, 5, 14.

In Land Court, see LAND COURT, 1, 2.

EXECUTOR AND ADMINISTRATOR.

1. The validity of the appointment of an administrator by the Probate Court, where the court had jurisdiction to make the appointment, cannot be questioned in an action brought by the administrator to recover money in the hands of the defendant alleged to belong to the estate of the plaintiff's intestate. Dallinger v. Morse, 501.

Taxation of property in hands of executor or administrator, see Tax, 3. Powers of Probate Court to appoint administrator de bunis non under certain circumstances, see PROBATE COURT, 1-3.

Case where separation of property, devised to trustee without order for equitable conversion, was necessary, but where, father being entitled to both real estate and personal property as sole heir and next of kin of son who died when of tender years, appointment of administrator of son's estate might not have been necessary, see Devise and Legacy, 12.

EXPRESS.

Duties under R. L. c. 100, § 50, of persons conducting general express business and receiving spirituous or intoxicating liquors for delivery in city or town where licenses of first five classes are not granted, see Intoxicating Liquors, 1.

FALSE IMPRISONMENT.

- 1. A person, who has been arrested without a warrant for drunkenness and after he has recovered from his intoxication has made a statement in writing and a request for release under the provisions of St. 1905, c 384, and who upon such request has been released, cannot sue the officer who arrested him for illegal arrest or imprisonment, this being expressly provided by § 2 of the statute, which in this provision is merely declaratory of the common law. Horgan v. Boston Elevated Railway, 287.
- Discharge of police officer, who made arrest without warrant, from liability for false imprisonment or illegal arrest, discharges one who assisted him in making arrest and carrier of passengers whose agent person assisting officer was, see Joint Tortfeasors, 1; Carrier, 1.

FALSE REPRESENTATIONS.

1. In an action of tort for damages resulting from the plaintiff's relying on false and fraudulent representations by the defendants that a corporation, of which they were officers and agents and which was not a party to the action, was engaged in legitimate stock brokerage business, whereas it was "doing a gambling business under the management of the defendants," if it appears that the plaintiff because of the representations dealt with the corporation and suffered a loss, the defendants cannot rely in defense upon certain instruments under seal, to which the plaintiff and the corporation were the only parties, and in which, on the completion of

certain specified transactions with the corporation, the plaintiff released and discharged it, "its principals, stockholders, officers, agents and servants, and each of them, therefrom, and also from any and all right of action, claim or demand under or by virtue of" St. 1890, c. 437, "or any act amendatory thereof or supplementary thereto, for any payment or posit at any time heretofore made, either on the within contract or any other contract or transaction whatsoever," and covenanted "never to sue therefor them or either or any of them, or on account of any other cause of action, claim or demand whatsoever," because the defendants were not parties to the instruments and could maintain no action against the plaintiff on the covenants not to sue contained in them. Clark v. Bullard, 586.

FIRE.

Insurance against loss by fire, see Insurance, 8-14.

*Action against railroad company to enforce alleged common law liability for causing fire which burned cottage of plaintiff in Rhode Island, see NEGLIGENCE, 64, 65.

FIREWORKS.

- 1. A town, which, exclusively for the gratuitous amusement of the public, undertakes the celebration of the fourth day of July under the authority of R. L. c. 25 as amended by St. 1908, c. 91, providing that a town may appropriate money for that purpose, is not liable in an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks from a public playground in conducting the celebration. Kerr v. Brookline, 190.
- 2. If a town undertakes exclusively for the gratuitous amusement of the public a celebration of the fourth day of July under the authority of R. L. c. 25 as amended by St. 1908, c. 91, providing that a town may appropriate money for that purpose, and its servants negligently discharge fireworks upon a public playground, the town cannot be said to be maintaining a nuisance so as to be liable, to one injured because of such acts of its servants. Ibid.
- 3. The setting off, by a town in conducting a celebration of the fourth day of July, of fireworks from a highway or across a highway is not a defect or want of repair in the way. Ibid.

FISH.

Evidence of customs in fish trade was admitted, at trial of action for purchase price of lot of mackerel, to show meaning of terms of contract of purchase, see SALE, 6, 7.

Effect of such customs when proved, see SALE, 8.

FIXTURES.

1. Portable furnaces, which are removable from place to place by disconnecting the smoke pipes and the heat pipes as those of a stove or range

are disconnected, do not necessarily become a part of the real estate to which they are affixed, and whether they have become so is a question of fact. Following Towne v. Fiske, 127 Mass. 125. Henry N. Clark Co. v. Skelton, 284.

FORGERY.

Questions as to admissibility of certain evidence determined in actions upon promissory notes against indorsers, husband and wife, where wife contended that her indorsement, which was in handwriting apparently not her own, was forged, and plaintiff contended that handwriting was feigned for purposes of committing certain fraud upon wife's father, see EVIDENCE, 6-8, 12.

FRATERNAL BENEFICIARY CORPORATION.

- 1. The beneficiary of a death benefit named in a certificate issued to a member of a fraternal beneficiary corporation incorporated under R. L. c. 119 can sue the corporation in his own name upon the contract made with the deceased member under whom he claims, and in like manner he can sue in his own name a corporation which has assumed toward the plaintiff the obligations of such fraternal beneficiary corporation upon such certificate. Timberlake v. Order of the Golden Cross, 411.
- Decree pro confesso in suit in equity in another State against Massachusetts fraternal beneficiary corporation among other defendants, declaring that consolidation, with corporation of such State, of Massachusetts fraternal beneficiary corporation was ultra vires, is not res judicata as to Massachusetts corporation if such corporation was not served with process except by publication in accordance with laws of such State, see Res Judicata, 1.
- In action against foreign fraternal beneficiary corporation by beneficiary under certificate issued to one who formerly was insured by death benefit certificate of Massachusetts fraternal beneficiary corporation and who, after foreign corporation undertook to assume obligations of Massachusetts corporation, paid assessments to foreign corporation for number of years up to time of death, foreign corporation cannot defend on ground that act of assuming obligations of Massachusetts corporation was ultra vires and that insured never was member of foreign corporation, see CORPORATION, 2.

FRAUD.

Suit in equity by trustee in bankruptcy of owner of vessel against assignees of mortgage of vessel, who had taken possession of her under assumed foreclosure which was fraudulent and void, in which plaintiff sought accounting and redemption, see Equity Jurisdiction, 5-7.

Provisions of R. L. c. 167, § 112, as to death of debtor dissolving attachment under certain circumstances, applies to attachment by trustee process, made upon petition for execution to enforce decree for alimony or separate maintenance, of property alleged to have been conveyed or concealed fraudulently by debtor, see ATTACHMENT, 4.

- Questions as to admissibility of certain evidence determined in actions upon promissory notes against indorsers, husband and wife, where wife contended that her indorsement, which was in handwriting apparently not her own, was forged, and plaintiff contended that handwriting was feigned for purposes of committing certain fraud upon wife's father, see EVIDENCE, 6-8, 12.
- Suit in equity to reach and apply, in satisfaction of debt alleged to be due plaintiff, attorney at law, for services rendered and to be rendered under special contract, property alleged to have been conveyed by debtor, before debt to plaintiff was contracted, with intent to hinder, delay and defeat future as well as existing creditors, where such conveyance did not make debtor insolvent, see Equity Jurisdiction, 14-16.
- Provision in deed of trust by married woman, that certain property placed in trust shall on her death be divided "precisely as if" she "had then died unmarried," when, four years after making deed, grantor procures divorce and then marries another man, is not void as in fraud of second husband, see Trust, 1.
- Suit in equity, to enforce resulting trust alleged to have arisen from fraudulent act of defendant in purchasing land with plaintiff's consent and by use of plaintiff's money and then refusing to recognize rights of plaintiff therein, was dismissed because money furnished by plaintiff comprised only part of purchase price of land, and no resulting trust arose, see Trust, 7.
- Action of tort for damages resulting from plaintiff's relying on false and fraudulent representations by defendants that corporation, of which they were officers and agents, was engaged in legitimate stock brokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents and servants," see False Representations, 1.

FRAUDS, STATUTE OF.

- 1. An oral promise of the owner of an equity of redemption in real estate, which is subject to a mortgage made by his grantor, to pay the mortgage note within a certain time less than a year to its holder, who is the assignee of the mortgage, in consideration of such holder's forbearance from foreclosing the mortgage, is not a promise to answer for the debt, default or misdoings of another within the meaning of R. L. c. 74, § 1, cl. 2. Manning v. Anthony, 399.
- 2. In a suit in equity against the owner of certain real estate called "the marsh" for the specific performance of an alleged agreement of the defendant to sell the property to the plaintiff, the following facts appeared: An agent of the defendant offered the property to the plaintiff for a certain price in a letter which contained no reference to any rights of way. The plaintiff replied by the following telegram: "Letter received Close deal understand Rights of way are included as we talked." Replying to

Frauds, Statute of (continued).

the telegram the agent wrote: "The matter is closed and the rights of way, as I understand, are included as we talked over." The "rights of way" constituted an important part of the property being purchased. On evidence which warranted the findings, the justice who heard the case found that, while it was possible to ascertain by oral evidence what was meant by the "rights of way" referred to, it was not possible to ascertain by any other means, that "no rights of way had become so connected with the marsh as to have acquired a definite meaning," and that "this language was not employed by the parties to designate rights of way in a technical sense, but to indicate the fee of certain land outside the marsh subject to rights of passage owned by other people." Held, that there was no sufficient memorandum under the statute of frauds, R. L. c. 74, § 1, cl. 4, as to the rights of way; and therefore that the suit must be dismissed. Bradley v. Haven, 800.

Another reason for dismissal of same suit, see CONTRACT, 7.

GENERAL COURT.

Respective duties and powers of General Court and of Governor with regard to appropriations were not changed by St. 1910, c. 220, see Constitutional Law, 18.

Question, whether previous act of Legislature had been passed over veto of Governor, was not proper one for House of Representatives to submit to Supreme Judicial Court under Constitution of Massachusetts, c. 8, art. 2, see Constitutional Law, 15.

GIFT.

Certain proposed statute making it criminal offense to engage in gift enterprise would be unconstitutional, in opinion of justices, see Constitutional Law, 5.

GOVERNOR.

Respective duties and powers of General Court and of Governor with regard to appropriations were not changed by St. 1910, c. 220, see Constitutional Law, 13.

Question, whether previous act of Legislature had been passed over veto of Governor was not proper one for House of Representatives to submit to Supreme Judicial Court under Constitution of Massachusetts, c. 8, art. 2, see Constitutional Law, 15.

GRADE CROSSING.

Questions determined in action against railroad company for death of one killed at grade crossing of railroad with highway, see RAILROAD, 2-5.

GUARANTY.

What constitutes.

In an action by a glass manufacturing corporation against the guarantors
of the performance of a contract by a certain corporation to purchase two

thousand gross of bottles to be made for it by the plaintiff, it appeared that the purchasing corporation had no financial rating and that guarantors were required by the plaintiff, that the names of the defendants as guarantors were submitted to and approved by the home office of the plaintiff, that a contract containing a guaranty clause was prepared on one of the regular forms used by the plaintiff and was delivered to the treasurer of the purchasing corporation, that this contract was signed by the defendants as guarantors but was not signed by the purchasing corporation itself, that it was delivered by the treasurer of that corporation to the plaintiff's manager, who in the presence of such treasurer indorsed upon it the plaintiff's acceptance, that the treasurer of the purchasing corporation by virtue of his office had authority to act for that corporation in all matters pertaining to its usual course of business and it did not appear that this authority was restricted by any vote or by-law. It was stipulated in the contract that it should not be binding until accepted at the plaintiff's home office, to which it was forwarded for indorsement. The plaintiff did not execute an indorsement of the contract at its home office, but retained it and never gave any notice of disaffirmance, and proceeded to perform the contract by manufacturing and delivering a part of the bottles, when its further performance was prevented by a repudiation of the contract by the purchasing corporation. Held, that these facts showed a delivery of the contract in behalf of the purchasing corporation and an acceptance of the contract by the plaintiff, the ratification of the act of the plaintiff's manager being sufficient without an execution of the instrument at the plaintiff's home office. Cumberland Glass Manuf. Co. v. Wheaton, 425.

2. In an action against four guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a specified kind to be made for it by the plaintiff, if it appears that the contract of sale and guaranty was signed by all of the four defendants and was delivered to the plaintiff by one of them, who had acted with full authority from the other three and who knew that the contract of sale and guaranty was accepted unconditionally by the plaintiff, it is not necessary for the plaintiff to show that he gave notice to the defendants of his acceptance of the guaranty. Ibid.

Construction.

8. In an action against the guarantors of the performance of a contract for the purchase by a certain corporation of two thousand gross of a certain kind of bottles to be manufactured for it by the plaintiff, where the plaintiff shows a breach of the contract by the purchasing corporation, after a part performance by the plaintiff, by the failure of the purchasing corporation to pay for the bottles already delivered to it and its refusal to take or pay for any more bottles under the contract, if the guaranty clause in the contract signed by the defendants provides that, in consideration of the plaintiff furnishing to the purchasing corporation various styles of bottles covered by the order, the defendants "guarantee the account" of the purchasing corporation, this phrase does not restrict the liability of

the defendants to the plaintiff's loss by reason of the failure of the purchasing corporation to pay for the bottles delivered, where the whole instrument in connection with the circumstances under which it was executed shows a clear intention on the part of the defendants to guarantee the performance by the purchasing corporation of all its obligations under the contract. Cumberland Glass Manuf. Co. v. Wheaton, 425.

4. In an action against the guaranters of the performance of a contract for the purchase by a certain corporation of two thousand gross of a certain kind of bottles to be manufactured for it by the plaintiff, where a breach of the contract by the purchasing corporation after a part performance by the plaintiff is shown and the plaintiff is entitled to recover from the defendants not only the price of bottles delivered but also the loss suffered by him by reason of a refusal of the purchasing corporation to take or pay for any more bottles under the contract, if there is a provision in the contract that specifications shall be submitted to the plaintiff from time to time for bottles to be made, and that the quantities for delivery during June, July and August shall be specified not later than March 1, "each delivery to be considered a separate contract," the contract being an entire one for the manufacture and sale of the whole two thousand gross of bottles, this provision does not limit the plaintiff's right to recover damages for all the portion of the contract which has been repudiated by the purchasing corporation. Ibid.

Notice to Guarantor of Principal's Default.

- 5. In an action against a guarantor of the performance of a contract to purchase goods from the plaintiff, the defendant can set up the defense that he was not notified by the plaintiff of the default of his principal only where he can show that he was or might have been prejudiced by the failure to notify him of the principal's default. In the present case, where the nature of the contract was such that no notice of default was necessary, it appeared affirmatively that the plaintiff had resorted to all the possible remedies against the principal, so that, even if he had been given the notice of default to which he was not entitled, he would have been no better off. Cumberland Glass Manuf. Co. v. Wheaton, 425.
- 6. In an action against the guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a certain kind to be made for it by the plaintiff, where it appears that the delivery and acceptance of the contract of purchase containing the guaranty signed by the defendants were absolute and unconditional and that, after the plaintiff had manufactured certain bottles for the purchasing corporation in accordance with the terms of the contract and had delivered a part of them and had others ready for delivery, the purchasing corporation failed to pay for the bottles delivered and notified the plaintiff that it would not receive or pay for any more bottles, the plaintiff need not show that he gave notice of these facts to the defendants, his proof of the default of their principal being sufficient. Ibid.

Guaranty (continued).

Damages.

7. In an action against the guarantors of the performance by a certain corporation of a contract to purchase two thousand gross of bottles of a certain kind to be made for it by the plaintiff, where the plaintiff shows that the contract of guaranty was absolute and unconditional, and that, after he had manufactured a certain number of bottles for the purchasing corporation in accordance with the terms of the contract, had delivered a part of them and had others ready for delivery, the purchasing corporation failed to pay for the bottles delivered and notified the plaintiff that it would not receive or pay for any more bottles, the plaintiff is entitled to recover from the defendants not only the price of the bottles delivered to the purchasing corporation but also damages for the loss suffered by the plaintiff by reason of the purchasing corporation's breach of contract in refusing to take the remainder of the bottles called for by the contract. Cumberland Glass Manuf. Co. v. Wheaton, 425.

See, further, as to damages for breach of such contract of guaranty, ante, 8, 4.

HIGHWAY.

See Way, 8-7; Constitutional Law, 2, 4, 6-8; Easement, 1; Fireworks, 1-8; Railboad, 1; Automobile, 1; Negligence, 47-59.

HOMICIDE.

Evidence.

Opinion: experts.

1. At the trial of an indictment for the murder of a woman, whose body was found with the throat cut by some sharp instrument, which had passed almost to the spinal column, completely severing the gullet and the jugular vein, where it is an undisputed fact that the deceased was left-handed, witnesses properly qualified as experts may be allowed to testify that the character, depth and direction of the wounds were such that they could not have been self inflicted, this being a subject not so far within the ordinary experience of intelligent jurors that they would not be instructed and aided by the opinion of experts. Commonwealth v. Spiropoulos, 71.

Admissions by conduct.

2. At the trial of two defendants, called respectively Peter and James, on an indictment for a murder alleged to have been committed by them jointly, a police detective testified that when the defendants were in a police station the defendant Peter repeated a confession, which he had made previously, that during this confession at different times the defendant James called to Peter to stop, saying, "Stop Peter! You lie! You lie! Peter, stop!", that the defendant Peter, after concluding his confession, rose from his chair and said to the other defendant, "Jim, tell the truth, tell the truth. You asked me not to tell, Jim, but I had to, for God's sake Jim tell the truth. You know you cut her throat with a VOL. 208.

razor. You know her blood was on your hands," that there was a silence of two minutes of everybody in the room, and that then the lieutenant of police in charge of the station said to the defendant James, "What have you got to say to Peter's story now, Jim?" whereupon the defendant James said, "Me no talk, me no talk. I want to see my lawyer, I want to see my lawyer." The defendant James excepted to the admission of this evidence against him. Held, that the evidence was admissible against the defendant James as well as against the defendant Peter. Commonwealth v. Spiropoulos, 71.

HOUSE OF REPRESENTATIVES.

Question, whether previous act of Legislature had been passed over veto of Governor, was not proper one for House of Representatives to submit to Supreme Judicial Court under Constitution of Massachusetts, c. 8, art. 2, see Constitutional Law, 15.

HUSBAND AND WIFE.

Separate Maintenance.

- 1. Although an order under R. L. c. 153, § 83, that a husband shall pay a certain sum of money monthly to his wife for her support, terminates in operation at the husband's death, yet it can be enforced against the husband's estate for arrears which accrued during his lifetime, and for this purpose the obligation is regarded as a debt of record established by a judgment. Mcllroy v. Mcllroy, 458.
- 2. An order made by a judge of the Probate Court under R. L. c. 153, § 83, that a husband shall pay a certain sum of money monthly to his wife for her support, and an order made under § 35 of that chapter and R. L. c. 152, § 31, that execution shall issue for the enforcement of the order for support, are not terminated or suspended in their operation by the resumption by the wife of cohabitation with her husband. Ibid.
- 8. Upon a petition to the Probate Court under R. L. c. 153, § 85, and c. 152, § 31, to enforce a previous order of that court, that a husband shall pay a certain sum of money monthly to his wife for her support, the judge of the Probate Court can consider any change in the position of the parties and any facts that have come into existence since the making of the first order, and, if he finds that justice so requires, he can order execution to issue for only a part of the unpaid arrears of the payments for support. Ibid.
- 4. Upon an appeal to the Superior Court from an order made by a judge of the Probate Court for the enforcement by execution of a previous order of the Probate Court that a husband shall pay a certain sum of money monthly for the support of his wife, the Superior Court has the same power to reduce the required payments on account of a change of circumstances that the Probate Court had. *Ibid*.

Husband and Wife (continued).

Dower.

Certain seashore lots were held not to be wild lands and to be of nature capable of being set off as dower, see Dower, 1.

Joint Contracts.

Questions as to admissibility of certain evidence determined in actions upon promissory notes against indorsees, husband and wife, where wife contended that her indorsement, which was in handwriting apparently not her own, was forged, and plaintiff contended that handwriting was feigned for purposes of committing certain fraud upon wife's father, see EVIDENCE, 6-8, 12.

Deed of Wife.

Provision in deed of trust by married woman, that certain property placed in trust shall on her death be divided "precisely as if" she "had then died unmarried," where, four years after making deed, grantor procures divorce and then marries another man, is not void as in fraud of second husband, see TRUST, 1.

ICE AND SNOW.

Landlord was held under circumstances not to be liable to guest of tenant for injuries caused by slip upon icy granolithic walk in courtyard of landlord's building, see LANDLORD AND TENANT, 8.

Action against owner of building, who retained control of roof, for injuries caused to traveller on adjoining street by falling upon him of icicle caused by water flowing from leak in conductor pipe and freezing, see NUISANCE, 1.

In order to maintain action against owner of building for personal injuries caused by ice, accumulated upon roof, falling upon plaintiff, notice required by St. 1908, c. 805, R. L. c. 51, §§ 20-22, must be given, see Nuisance, 2.

INHERITANCE TAX.

See Tax, 4.

INSOLVENCY.

Suit in equity to reach and apply, in satisfaction of debt alleged to be due to plaintiff, attorney at law, for services rendered and to be rendered under special contract, property alleged to have been conveyed by debtor, before debt to plaintiff was contracted, with intent to hinder, delay and defeat future as well as existing creditors, where such conveyance did not make debtor insolvent, see Equity Jurisdiction, 14-16.

INSURANCE.

Life.

Application.

Action upon policy of life insurance, which was lost, where there were questions as to contents of application and as to whether copy of application was annexed to policy, see post, 5, 6.

Misrepresentations of insured.

- 1. At the trial of an action on a policy of life insurance, where the defendant contends that the policy is void because the insured made misrepresentations in the application, a copy of which is attached to the policy, it is right for the presiding judge to refuse to rule that "the burden is on the plaintiff to show affirmatively that all the statements in the application material to the risk were true," because this does not state correctly the rule of law now in force in this Commonwealth under our statutes. Monjeau v. Metropolitan Life Ins. Co. 1.
- 2. If, at the trial of an action upon a policy of life insurance, it appears that the mother of the insured died of consumption and that the insured previously had applied unsuccessfully to another company for life insurance, and these facts are contrary to statements made by the insured in his application for the insurance, which is attached to the policy, the questions, whether either of these misrepresentations was made with intent to deceive, or whether the risk of loss was increased by the fact that the mother of the insured died of consumption or by the fact that the insured made a previous unsuccessful application for life insurance to another company, are for the jury. Ibid.
- 3. Testimony, that a physician told the father of a certain girl that he thought that she had the consumption at a time when an insurance policy was taken out upon her life for the benefit of her father, is no evidence that she had the consumption at that time, and only tends to show that if she had that disease the father had been informed of the fact. In the present case the jury found that the insured did not have the consumption, so that the question whether the father thought that she had or represented that she had was rendered immaterial. *Ibid*.

Proof of death.

4. At the trial of an action on a policy of life insurance, where the plaintiff has introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant has introduced an instrument which its witnesses testify is a true copy of the policy, but this is denied by the plaintiff, and where the defendant does not put in evidence any proofs of death and there is no agreement as to the kind of proof of death required by the lost policy, and there is evidence that the defendant was satisfied with the proofs of death sent to it, whatever they were, it is right for the presiding judge to

refuse to rule as matter of law that the proofs of death were insufficient. Monjeau v. Metropolitan Life Ins. Co. 1.

Lost policy.

- 5. At the trial of an action on a policy of life insurance, the plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant introduced an instrument purporting to be an original application for the insurance, which the plaintiff denied was such, and an instrument which the defendant's witnesses testified was a true copy of the policy, which referred to an application and had annexed to it a copy of the application put in evidence by the defendant, but the plaintiff denied that the instrument introduced by the defendant was a true copy of the policy, and asserted that the original policy had no copy of an application attached to it. The judge refused to make certain rulings requested by the defendant based on statements contained in the application which the defendant's witnesses testified was attached to the policy. Held, that, as the question whether the application was attached to the policy was for the jury, the judge properly might refuse to make any ruling which assumed as a fact that the application was so attached. Monjeau v. Metropolitan Life Ins. Co. 1.
- 6. At the trial of an action on a policy of life insurance, the plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral testimony as to the contract of insurance contained in the lost policy, and the defendant introduced an instrument purporting to be an original application for the insurance, which the plaintiff denied was such, and an instrument which the defendant's witnesses testified was a true copy of the policy, which referred to an application attached to it, but the plaintiff denied that the instrument introduced by the defendant was a true copy of the policy, and asserted that the original policy had no copy of an application attached to it. Unless the copies introduced by the defendant were true ones, there was ample evidence that the proofs of death either were satisfactory to the defendant or had been waived. The presiding judge refused to rule that the plaintiff was not entitled to recover. Held, that the refusal of the judge was right, because the questions, what were the terms of the contract and whether they had been performed by the plaintiff or waived by the defendant, were for the jury. Ibid.

Other rulings at trial of action upon lost policy, see ante, 1-4.

Statutory requirements as to policy.

7. A foreign insurance corporation, with a capital stock of \$2,000,000 and a very large surplus, engaged since 1879 chiefly in the business of industrial insurance, namely, of the issuing of non-participating life insurance policies in sums of less than \$500 with a fixed premium payable in small instalments at short intervals, usually weekly, had made in its policies, in order to avoid fraudulent risks and to keep the expense of investigations



Insurance (continued).

duly proportional to the amount of the insurance, limitations that, if the insured died within a certain number of months of the issuance of the policy, nothing should be payable thereunder. In 1909 it proposed to issue a policy of industrial life insurance containing the following provision on the first page: "One half only of the above sum payable if death occur within six calendar months from date, and the full amount if death occur thereafter," and on the third page the following provision: "Accidental Death. In the event of the death of the insured from accident within six months from the date of this policy, the full amount of insurance named in the first schedule will be paid subject to the policy conditions." Held, that the provisions above quoted did not constitute accident insurance within the description contained in St. 1907, c. 576, § 32, cl. 5, and therefore that the life insurance policy which the corporation proposed to issue did not violate the requirement of § 84 that "contracts of insurance for each of the classes" specified in § 32" shall be in separate and distinct policies." Metropolitan Life Ins. Co. v. Insurance Commissioner, 886.

Recovery of money paid for premium which never became due.

In action against insurance company where declaration contained count upon policy of life insurance, which was lost, and count for money paid to company for premium which never became due because of death of insured, request for ruling that, because of certain facts, if insured's policy was like one introduced in evidence by defendant, plaintiff could not recover, was held properly to have been refused because judge properly might have considered it as applying to whole declaration, and plaintiff's right to recover premium prematurely paid did not depend upon terms of contract of insurance, see Practice, Civil, 18.

Fire.

Statement of loss.

8. At the trial of an action against an insurance company by a mortgagee of real estate upon a policy of fire insurance in the Massachusetts standard form insuring a building in Chelsea, it appeared that the interest of the mortgagor had been cut off by the foreclosure of a mortgage subsequent to the plaintiff's, that thereafter the building was destroyed in "the Chelsea fire" on April 12, 1908, and that the plaintiff gave to the defendant on June 9, 1908, "a sworn statement, setting forth the matters and particulars required by the condition relative thereto contained in " the policy. The condition referred to required the rendering of such a statement to the company "forthwith" after the loss or damage was suffered. Held, following Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 230. that under the policy, where a mortgagee is required to render such a statement, he must furnish "within a reasonable time, proper information in regard to the loss, as to such matters as a mortgagee reasonably may be expected to know"; and that the statement rendered by the plaintiff satisfied the requirements of the policy. Amory v. Reliance Ins. Co. 878.



Arbitration.

9. In an action on a policy of fire insurance in the Massachusetts standard form, which contains the usual clause requiring that, in case of a failure of the parties to agree, the amount of loss shall be ascertained by arbitration as a condition precedent to any right of action, if the plaintiff merely shows that at his request three referees were selected, who met, heard the parties and prepared and signed an award determining the amount of the plaintiff's loss, this is not enough, and he must show further that in some way the award was made known to the plaintiff and to the defendant; because the arbitration clause requires by necessary implication that the award shall be transmitted to the parties or published by giving notice to them of the decision. Weisman v. Firemen's Ins. Co. 577.

Mortgagee's rights.

- 10. At the trial of an action against an insurance company upon a policy of fire insurance in the Massachusetts standard form, brought by the holder of a second mortgage upon the premises described in the policy, it appeared that on a September 25, previous to the time when the plaintiff received his mortgage, one, who then held a mortgage on the premises and for whose benefit the policy then read, indorsed upon the policy a release of all his interest therein and the mortgagor indorsed upon it "In case of loss pay this policy to A, first mortgagee, as his interest may appear, under present or any future mortgages on the insured property. Balance, if any, to [the plaintiff], second mortgagee, as his interest may appear." The insurance company assented to the indorsement. Subsequently the mortgagor made another mortgage to one who, for default in the performance of its condition, foreclosed it, thus terminating all rights of the mortgagor under the policy. Held, that the release of the holder of the mortgage which was prior to those of A and of the plaintiff and the indorsement of the mortgagor upon the policy furnished a good consideration for the undertaking of the defendant to indemnify the plaintiff after indemnifying A. Amory v. Reliance Ins. Co. 878.
- 11. At the trial of an action against an insurance company upon a policy of fire insurance in the Massachusetts standard form, brought by the holder of a second mortgage upon the premises described in the policy, it appeared that on a September 25, previous to the time when the plaintiff received his mortgage, one, who then held a mortgage on the premises and for whose benefit the policy then read, indorsed upon the policy a release of all his interest therein and the mortgagor indorsed upon it "In case of loss pay this policy to A, first mortgagee, as his interest may appear, under present or any future mortgages on the insured property. Balance, if any, to [the plaintiff], second mortgagee, as his interest may appear." The insurance company assented to the indorsement. On the same day the mortgage to A and that to the plaintiff were made, and the mortgage to A was delivered to him on the next day, at which time the plaintiff paid a sum of money representing the amount of the mortgages to him and to A and also the amount of all prior mortgages on the property. The mortgage to the plaintiff was not delivered to him until October 6. The rep-

resentatives of the insurance company had no knowledge of the facts except what might be inferred by them from the papers which they saw. No fraud or concealment was practised. *Held*, that the mortgagor's indorsement as to payment to the plaintiff in case of loss under the policy should be construed as having reference to the plaintiff's holding under a mortgage already arranged for and made that day, although the mortgage did not take effect by delivery until eleven days later. *Amory* v. *Reliance Ins. Co.* 378.

- 12. At the trial of an action against an insurance company by a mortgages of real estate upon a policy of fire insurance in the Massachusetts standard form, which contained the provision that "whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured," it appeared that the defendant had not made any payment or requested any assignment of the plaintiff's mortgage, that the plaintiff, although ready and willing to assign his mortgage to the defendant upon receipt of the amount due thereon, never had offered so to do nor had informed the defendant of such willingness, and that, previous to the fire which had caused the loss, the plaintiff had discharged certain other mortgages which he held under assignment from other mortgagees as further security for his load. Held, that such facts showed no valid defense to the action, since the defendant had not elected to pay the debt due to the plaintiff and to take an assignment of the mortgage and mortgage note, and since the plaintiff was not required to hold himself in a position to assign to the defendant all his security, but only the mortgage together "with the note and debt thereby secured." Ibid.
- 13. At the trial of an action against an insurance company by a mortgagee of real estate upon a policy of fire insurance in the Massachusetts standard form, the following facts appeared: The policy was issued before the plaintiff had any interest in the premises and was made "payable in case of loss to [a prior mortgagee] as interest may appear." The prior mortgagee assigned his mortgage to the plaintiff, who took and held it as collateral security for an indebtedness of the mortgagor which also was secured by a mortgage given to the plaintiff on the same day as the assignment. Over two months later the prior mortgagee executed upon the policy the following indorsement: "For value received I hereby assign to [the plaintiff] all my interest as mortgagee in this policy." The indorsement was assented to by the defendant. Subsequently the plaintiff discharged the prior mortgage. The interest of the mortgagor in the real estate was cut off by the foreclosure of a mortgage subsequent to that of the plaintiff. Held, that by the discharge of the prior mortgage the plaintiff lost any right he had to payment under the policy. Ibid.

Interest.

14. A mortgagee of real estate, to whom was payable in case of loss or damage to the real estate the amount of a policy of fire insurance in the

Massachusetts standard form which provided that the company within sixty days after receiving a statement of loss should pay the amount for which it was liable, that amount, if not agreed upon, to be determined by referees to be chosen, on a June 9 rendered the required statement to the company of a loss sustained on the preceding April 12. *Held*, that the amount due on the policy was payable on August 8, and that, if it was not paid or tendered to the mortgagee at or before that time, he was entitled to interest from that date. *Amory v. Reliance Ins. Co.* 378.

Accident.

15. In an action upon a policy of accident insurance for the loss of the plaintiff's right hand, which was amputated in consequence of its injury in the burning of a building, where a defense relied upon is that the plaintiff at the time of obtaining the insurance was deeply in debt and procured the policy for the purpose of defrauding the defendant, and that in pursuance of this purpose he voluntarily suffered the physical injury for which he sought to recover, the defendant may be allowed to introduce any evidence tending to show that the plaintiff at about the time the policy was issued was in straitened financial circumstances and had immediate need of ready money. Everson v. Casualty Co. of America, 214.

Certain policy of industrial insurance which was held not to violate requirement of St. 1907, c. 576, § 84, prohibiting combining in one policy of contracts of insurance of more than one of specified kinds, see ants, 7.

Industrial.

Certain policy of industrial insurance which was held not to violate requirement of St. 1907, c. 576, § 34, prohibiting combining in one policy of contracts of insurance of more than one of specified kinds, see ante, 7.

Fraternal Beneficiary.

In action against foreign fraternal beneficiary corporation by beneficiary under certificate issued to one who formerly was insured by death benefit certificate of Massachusetts fraternal beneficiary corporation and who, after foreign corporation undertook to assume obligations of Massachusetts corporation, paid assessments to foreign corporation for number of years up to time of death, foreign corporation cannot defend on ground that act of assessing obligations of Massachusetts corporation was ultra vires and that insured never was member of foreign corporation, see CORPORATION, 2.

INTEREST.

Determination of time when interest should begin to run on payment due from insurance company to mortgagee of premises lost by fire, see INSURANCE, 14.

Certain bequest of sum to trustees to purchase annuity for niece of testator was held to give niece right to receive money outright and to interest

Intoxicating Liquors.

from expiration of one year from death of testator, see DEVISE AND LEGACY, 7, 8.

INTOXICATING LIQUORS.

Transportation.

1. Under R. L. c. 100, § 50, requiring that every person conducting a general express business and receiving spirituous or intoxicating liquors for delivery in a city or town where licenses of the first five classes are not granted "shall keep a book, and plainly enter therein," the date of the reception of each package of such liquor and other matters, and that "said book shall at all times be open to the inspection of" certain officers, the book must accompany the liquors and be in the possession of the person transporting them with the entries required at each stage of their transportation from their receipt to their delivery. Commonwealth v. Fostello, 65.

JOINT TORTFEASORS.

1. If an arrest for drunkenness is made without a warrant by two persons jointly, one of whom is a police officer and the other of whom is not, and the person arrested after he has recovered from his intoxication makes a statement in writing and a request for release under the provisions of St. 1905, c. 384, and is released upon such request, this not only discharges the police officer from liability for illegal arrest or imprisonment, but also discharges from such liability the person not an officer who joined in making the arrest, because the discharge of one of two joint tortfeasors discharges both. Horgan v. Boston Elevated Railway, 287.

JUDGMENT.

Arrest of, see Practice, Civil, 48, 49.

When finding of fact or ruling of law by justice hearing suit in equity involving meaning of provision in will becomes res judicata, see Equity Jurisdiction, 1.

Attorney at law, who has prosecuted suit to final judgment in favor of client, while he has lien on judgment in favor of client, has no property right therein, see ATTORNEY AT LAW, 2, 8.

Decree pro confesso in suit in equity in another State against Massachusetts fraternal beneficiary corporation among other defendants, declaring that consolidation, with corporation of such State, of Massachusetts fraternal beneficiary corporation was ultra vires, is not res judicata as to Massachusetts corporation if such corporation was not served with process except by publication in accordance with laws of such State, see Res Judicata, 1.

JURY AND JURORS.

As to order of challenging of jurors at trial of criminal case, see PRACTICE.

CRIMINAL. 4.

LABOR AND LABOR UNION.

- 1. Conduct of workmen which directly affects an employer to his detriment by interference with his business is not justifiable in law unless it is of a kind and for a purpose that tend to procure benefits that the workmen are trying to obtain. *Folsom* v. *Lewis*, 336.
- 2. The purpose of adding to the power of a labor union, in order to put it in a better condition to enforce its demands in controversies with employers that may arise in the future, does not justify an attack on the business of an employer by inducing his workmen to strike. *Ibid*.
- 8. A strike by workmen engaged in a certain trade, to compel their employers to submit to an attempt to obtain for a labor union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wish to work at the trade to join the union and by forcing the employers to agree not to employ workmen unless they are members of the union or have agreed to become members, is not for a lawful purpose, and a suit in equity may be maintained to enjoin it. 1bid.
- Power of Legislature to make it criminal offense to employ any one more than eight hours a day upon public work, see Constitutional Law, 9.
- Law, which should attempt to limit citizen in exercise of right to make contracts by forbidding his employment for more than eight hours each day, would be unconstitutional, see Constitutional Law, 3.
- Provision, in statute making employment of any one upon public work for more than eight hours each day a criminal offense, that working more than eight hours in any one day shall be *prima facie* evidence of violation of statute, would be unconstitutional, see Constitutional Law, 10.

LAND COURT.

- The denial by a judge of the Land Court of a motion to vacate a part of a previous decision or finding of that court and to enter a new decision as to that part is within the discretion of the judge and is not the subject of 'exception. Foss v. Atkins, 510.
- The denial by a judge of the Land Court of a motion for a rehearing upon a petition in that court is within the discretion of the judge and is not the subject of exception. Ibid.

LANDING PLACE.

 A new landing place cannot be established or laid out by a city without legislative authority. Commercial Wharf Corporation v. Boston, 482.

City council of Boston had no power to make certain lease from owner or "a location for a boat landing" in 1891, nor could any of its officers bind it to pay rent therefor, nor was it liable for use and occupation thereof, after it had occupied under invalid lease signed by mayor in accordance with invalid vote of council, see Boston, 1, 2; MUNICIPAL CORPORATIONS, 6.

LANDLORD AND TENANT.

Construction of Lease.

- 1. In an action on a covenant to pay rent contained in a lease in writing, evidence of conversations between the plaintiff's agent and the defendant in regard to the terms and conditions of the lease, which took place before its execution, is not admissible to vary the unambiguous terms of the instrument. Gaston v. Gordon, 265.
- 2. In an action to recover rent upon a covenant in a lease, it appeared that the lease contained elaborate provisions defining the rights of the respective parties, and contained a covenant on the part of the lease that he would use the premises solely for the retail liquor business and would not use them for any other purpose, that the defendant failed to obtain a license for the sale of intoxicating liquors on the premises, and thereupon gave notice to the plaintiff, and refused to occupy the premises or to pay rent, contending that it was an implied condition of the lease that the lessee should be able to procure a license, and that if he failed to do so upon a proper application he was not bound by the lease. Held, that no such term of the lease was to be implied, that the defendant's obligation to pay rent was an absolute one, and that he was not excused from his obligation by the refusal of a public board, for whose action the plaintiff was in no way responsible, to act favorably on the defendant's application for a license. Ibid.

Liability of Landlord to Tenant or Tenant's Guest.

8. A landlord is not liable to a tenant of an apartment in his building, and consequently is not liable to a guest of such tenant, for injuries from a fall caused by snow and ice on a granolithic walk in the court yard of the building leading to a public street, where it is not shown that the landlord had taken upon himself the duty of keeping the way clear of snow and ice, and it appears that the condition of the walk was due entirely to a combination of rain, snow and freezing weather, and was not due to any defect in the walk or in the building, or to the snow being trampled upon. O'Donoughue v. Moors, 473.

Liability of Tenant for Rent.

- 4. In an action on a covenant to pay rent contained in a lease in writing, where the execution and delivery of the lease are admitted and it appears that the defendant refused to pay rent in accordance with its terms without any just ground for such refusal, the only correct conclusion possible as matter of law is that the plaintiff is entitled to recover, and a verdict for the plaintiff should be ordered. Gaston v. Gordon, 265.
- 5. At the trial of an action of contract to recover rent for the occupation of a cottage belonging to the plaintiff, which is subject to a mortgage, the presiding judge properly may refuse to give an instruction singling out

- certain evidence favorable to the defendant as tending to show that the plaintiff intended to hold the mortgages for the rent, where this is only one of the circumstances to be weighed by the jury in determining whether the defendant hired the cottage from the plaintiff. O'Brien v. Shea. 528.
- 6. In an action to recover rent for the occupation by the defendant of a cottage belonging to the plaintiff, which is subject to a mortgage, if there is evidence warranting a finding that the defendant made a lawful agreement to hire the cottage from the plaintiff, it is not necessarily a defense to the action to show that the plaintiff intended to treat the defendant as occupying under the mortgagee and to hold the mortgagee accountable for the rent, and that the action against the defendant was begun only after an unsuccessful attempt to hold the mortgagee liable, because the relations between the plaintiff and the mortgagee, although important, are only material in determining whether the defendant hired the cottage from the plaintiff. 1bid.

'Mere fact, that oral agreement to hire real estate was made on Lord's day,
does not necessarily preclude landlord from recovering for use and occupation thereafter, see Contract, 9.

City council of Boston had no power to make certain lease from owner of "a location for a boat landing" in 1891, nor could any of its officers bind it to pay rent therefor, nor was it liable for use and occupation thereof, after it had occupied under invalid lease signed by mayor in accordance with invalid vote of council, see Boston, 1, 2; Municipal Corporations, 6.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

1. An entire page of a newspaper was covered with the following, with regard to the mayor of the city in which the newspaper was published, who was a candidate for re-election: A cartoon or caricature labelled "City Farm" and showing inmates emaciated, in various attitudes of dejection and despair, some sitting at a dining table and others rising in disgust or protest as a woman approached bearing a tray containing a small amount of food and a teapot. Toward the tray hands pointed from the words, "Poor food," "Rancid butter," "Shadow tea"; while just beside and behind the woman was depicted a large receptacle labelled, "Forty gallons of water to a pound of fifteen-cent tea." At the top of the page above the picture were the words in very large type, "Saving on the city's poor is the meanest kind of economy"; while underneath, in a little smaller type, were the words, "It is no crime to be poor, but it is wrong to stint the poor and the unfortunate." Then followed this language in large print: "Mayor Brown forced a competent and humane board of charity out of office because it would not do his bidding, and he put in the present charity board, which has been cognizant of this outrage upon the

poor and unfortunate inmates of our city farm. In the name of humanity and public decency, let us go to the polls tomorrow, like men, and repudiate the mayor who has been solely responsible for this blot upon the fair name of our city." In an action by the mayor against the publisher of the newspaper, the foregoing facts were alleged in the declaration, and there was evidence to prove them all. *Held*, that the publication was actionable as a libel, and that the case was for the jury. *Brown* v. *Harrington*, 600.

- 2. In this Commonwealth a newspaper article containing false and defamatory statements of fact in regard to the conduct of one who is a candidate for a public office is not privileged and its author and publisher may be convicted of criminal libel, even if they reasonably and honestly believed the charges as stated to be true and acted in good faith. Commonwealth v. Pratt, 558.
- 8. At the trial of an indictment for the publication of a libel regarding the mayor of a city who was a candidate for re-election, if the libel which the defendant is charged with publishing contains only statements of fact of a defamatory nature and the trial judge fully and adequately instructs the jury that if the statements were true the defendant should be acquitted unless he acted with express malice, the defendant is not harmed by a refusal of the judge to instruct the jury with regard to the law of qualified privilege, because if the statements were untrue or were published with express malice they would not be fair criticism or reasonable comment as to facts, and therefore could not be privileged. *Ibid*.
- 4. Where, at the trial of an indictment for libel in the publishing of certain defamatory statements with regard to one W, who at the time of the publication was the mayor of a certain city and was a candidate for re-election, there is evidence that in publishing the statements the defendant acted with express malice, it is proper for the trial judge to refuse to rule, that, "assuming that W . . . was a candidate for re-election to the office of mayor at the time alleged in the indictment, then if the jury are satisfied that the charges as alleged in the indictment were reasonable criticism and comment upon the real acts of the said W, and the consequences likely to follow from said acts, no conviction can be had under the indictment even though such criticism and comment were severe and sarcastic and tending to ridicule the said W," because such a ruling contains no reference to the possibility of conviction on the ground of express malice. Ibid.
- 5. At the trial of an indictment charging the publication of a libel stating that the mayor of a city, who was, a candidate for re-election at an election to be held just after December 18 of a certain year, was intoxicated on a certain occasion, there was evidence tending to show the following facts: The defendant, who was a clergyman, called at the mayor's private business office on July 8 of that year, introduced himself as a correspondent of a newspaper of a distant city and in conversation accused the mayor with being intoxicated a few days before, which was the occasion described in the alleged libellous publication. The mayor denied the accusation. Subsequently the defendant gained access to the mayor's office under



an assumed name and, being ordered out said, "You can't scare me. N [the opposition candidate for mayor] will attend to you." On November 22 the defendant stated to the chief of police of the city that he "had an article about" the subject matter of the alleged libel "all written up and sealed in a safe in the hands of a printer ready to be published at a word from him." On November 26 he wrote to the chief of police that he wanted "something done" in the matter "at once." On December 8 or 9 he interviewed the chief of police and stated that he had come to give the mayor a "last chance," that he had "a lot of matter prepared," and sought to make an appointment at noon of that day to show it to the chief of police. Asked what he would do if the mayor denied the allegations, he said he should publish them. Within the first ten days of December he was interviewed by a reporter, whom he knew to be the representative of a newspaper in which the alleged libel afterwards was published, and made to him the statements which were published on December 10. Held, that there was evidence warranting a finding that the defendant legally was responsible for the libel. Commonwealth v. Pratt, 553.

LICENSE.

Under what circumstances Legislature by statute can give to cities or towns or boards of public officers authority for granting of licenses or permits for bridging public streets, see Constitutional Law, 8.

LIS PENDENS.

Plea in abatement in action of contract, alleging that another action was pending in which plaintiff was defendant and was setting up same claim in declaration in set-off, and proper action of court upon such plea, see PRACTICE, CIVIL, 1-4.

LORD'S DAY.

Mere fact, that oral agreement to hire real estate was made on Lord's day, does not necessarily preclude landlord from recovering for use and occupation thereafter, see CONTRACT, 9.

MANDAMUS.

1. A judge of the Superior Court made an order denying motions of the defendants in a criminal case in the following words: "I refuse to hear the parties on the several motions of the defendants that the court order a trial of these indictments in some county other than the county of Suffolk believing that I have no jurisdiction to entertain or grant such motions." Held, that this order did not mean that the judge of the Superior Court had considered the subject matter of the motions and ruled as matter of law that that court had no jurisdiction of such motions, in which case the only remedy of the defendants would have been by exception or appeal under R. L. c. 219, §§ 32, 34, 35, but that the order was a refusal to act at all upon the motions, and therefore that the defendants had a right to resort to the extraordinary remedy of mandamus to compel the justices of the Superior Court to exercise their judicial faculty and either to deny the motions as matter of law or to determine whether they ought to be granted. Crocker v. Justices of the Superior Court, 162.

Writ of mandamus is not remedy to compel assessors to change decision refusing to abate tax, see Tax, 10.

MARRIAGE AND DIVORCE.

Certain questions as to admission and exclusion of evidence which were determined upon exceptions alleged at hearing of libel for divorce, see WITNESS, 2; PRACTICE, CIVIL, 12, 40.

MARRIED WOMAN.

See Husband and Wife.

MASTER.

In suits in equity, see Equity Pleading and Practice, 2-4.

MASTER AND SERVANT.

See AGENCY.

MECHANIC'S LIEN.

1. Under R. L. c. 197, § 6, it is only where labor was performed under an entire contract which included both labor and materials at an entire price, that the number of days of labor must be given in a statement filed to preserve a mechanic's lien for labor only. Where the lien is for the contract price agreed upon by the parties for labor only, it is not necessary to particularize by stating the number of days taken in its performance. Martin v. Stewart, 588.

MILK.

1. The board of health of a city, undertaking to act under the authority given to them by R. L. c. 75, §§ 65, 140, made the following regulation: "No person or corporation shall sell or offer, expose or keep for sale in any shop, store or other place where goods and merchandise are sold, milk or cream, unless the same is sold or offered, exposed or kept for sale in tightly closed or capped bottles or receptacles, which have been approved by the board of health." Held, that the statute, which confines the jurisdiction of the board to examining into all nuisances, sources of filth and causes of sickness in the city that in their opinion may be injurious to the public health, to destroying, removing or preventing "the same as the case may require," and to making "regulations for the public

health and safety relative thereto and to articles . . . capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed through" the city, does not give the board power to make a regulation as to the sale of milk kept and sold in any such way as does not threaten the public health. Commonwealth v. Drew, 493.

2. A dealer in milk in a city kept in his store for sale wholesome milk of standard quality in a new tin cylinder or vessel with a new, clean removable top, the vessel being contained in a covered cooler, which was kept in a location and under such conditions as were approved by the board of health, contained wholesome, clean ice, and was properly drained and cared for and tightly closed except when milk or ice was being removed from or introduced into it. The milk always remained at a temperature less than fifty degrees Fahrenheit and none of it was allowed to stand outside of the cooler except when a sale was being made. The measure which was used in retailing the milk was new and clean and hung inside the cylinder which contained the milk. The cylinder was simple in shape, was easily cleaned and was susceptible of perfect sterilization. Held, that R. L. c. 75, §§ 65, 140, gave to the board of health of the city no jurisdiction or power to take any action or to make any regulation with regard to milk so kept and sold. Ibid.

MORTGAGE.

Of Personal Property.

Foreclosure.

- 1. In an action by a mortgagee of real estate against the mortgagor to recover a balance remaining due upon the mortgage note after a sale of the mortgaged property under a power of sale in the mortgage, if the mortgagor contends that the sale was not made in good faith and was not properly conducted, the burden is upon him to establish that contention. Valey v. Bigelow, 89.
- 2. The provision in a mortgage of real estate giving the mortgagee power to sell the mortgaged property in case of default by the mortgagor in the performance of the conditions of the mortgage did not require the mortgages to give to the mortgagor notice of an intended foreclosure sale. The mortgagee foreclosed the mortgage under the power of sale and complied strictly with the provisions of the mortgage with regard thereto. The evidence as to whether there was a notice given to the mortgagor was conflicting, an attorney who acted for the mortgagee and purchaser in his behalf testifying that it was "his remembrance" that such notice was given, and there being "direct, affirmative and positive evidence" that no such notice was given. There was no effort made to advertise the sale beyond the required foreclosure notice in a newspaper. There were but ten persons at the sale and only one bid, which was made by the attorney of the mortgagee. The property was sold for \$7,200, and its fair market value at the time was \$10,000. The mortgagor had sold his interest in the mortgaged property two years before the sale. After the sale there 45 **VOL. 208.**

Mortgage (continued).

was still due to the mortgages on the mortgage note \$3,488 for which he brought an action against the mortgagor, who contended that the sale was not conducted properly or in good faith and that there should have been no deficiency. The case was tried before a judge without a jury and the foregoing facts were in evidence. The defendant made no special requests for findings but asked the judge to rule that as matter of law the plaintiff could not recover. The ruling was refused, the judge found for the plaintiff, and the defendant alleged exceptions. Held, that the exception must be overruled, since on the evidence the judge was warranted in finding that the sale was conducted by the plaintiff properly and in good faith. Vahey v. Bigelow, 89.

Suit in equity by trustee in bankruptcy of owner of vessel against assignees of mortgage of vessel, who had taken possession under assumed foreclosure which was fraudulent and void, in which plaintiff sought accounting and redemption, see Equity Jurisdiction, 5-7.

Action for balance remaining after foreclosure.

Exception by defendant, at trial before judge without jury of action against mortgager for balance remaining due upon mortgage note after foreclosure sale, which was held not to raise question whether taxes paid by mortgagee properly were included in judge's finding, see PRACTICE, CIVIL. 89.

Redemption.

Release by borrower of rights under small loans act, R. L. c. 102, § 51, is effectual, and, in bill to redeem from mortgage within provisions of act, previous mortgages of same property, closed by such releases, cannot be reopened, although there was practically but one loan, see SMALL LOANS ACT, 2, 8.

Of Real Estate.

Foreclosure and action for balance remaining due thereafter.

8. A mortgagee, who has foreclosed a mortgage of real estate under a power of sale contained therein, is not estopped by a recital in an affidavit made by him under R. L. c. 187, § 15, as amended by St. 1906, c. 219, § 2, and annexed to his deed given under the power of sale, that he sold the real estate for \$12,500, from showing, in an action on the mortgage note for the balance due after crediting the proceeds of the sale, that the property was sold at the foreclosure sale for only \$10,000. Gilson v. Nesson, 368.

Rights of mortgagee to insurance.

Various questions determined with regard to rights of certain mortgages to insurance to be paid after loss of premises in Chelsea fire of April 12, 1908, see Insurance, 8, 10-14.

Agreement to pay if foreclosure forborne.

Oral promise by owner of equity of redemption of real estate subject to mortgage, to pay mortgage note within certain time less than year if holder of note would forbear from foreclosing mortgage, is not within statute of frauds, see Frauds, Statute of, 1.

MUNICIPAL CORPORATIONS.

Officers and Agents.

- 1. Where one is invited or seeks to make a certain contract with a municipal corporation, he is chargeable with knowledge of the extent of or lack of authority of the corporation and its various officers and agents to make such a contract. Commercial Wharf Corporation v. Boston, 482.
- The assessors of a city or town have no authority to consent in behalf of
 the city or town to proceedings in a court of equity to determine the
 validity of a tax. Nor has the collector of taxes of a city or town such
 authority. Welch v. Boston, 326.
- 3. Even if the inhabitants of a town or the city council of a city should attempt by a vote in regular form to consent to proceedings in a court of equity to determine the validity of a tax assessed by the assessors of the town or city, it seems that such action could have no effect, because there can be no waiver in behalf of the public except by legislative authority. Expression of opinion in Forest River Lead Co. v. Salem, 165 Mass. 198, 202, explained. Ibid.
- 4. The selectmen of a town, which has accepted the provisions of R. L. c. 104, § 4, with regard to the appointment of "the superintendent of public buildings or such other officer as the . . . selectmen . . . may designate" to be inspector of buildings, have no power to fix the compensation of one whom they have appointed building inspector. America v. Saugus, 51.
- 5. It seems that a person appointed to be an inspector of buildings in a town which has accepted the provisions of R. L. c. 104, § 4, with regard to the appointment of "the superintendent of public buildings or such other officer as the . . . selectmen . . . may designate" to be such inspector, is not entitled to any additional compensation for the duties thus imposed upon him. Ibid.
- Power of Legislature to make it criminal offense to employ any one more than eight hours a day upon public work, see Constitutional Law, 9.

Contracts.

6. Since the city of Boston has no authority to make an express agreement to pay rent for the use and occupation of a landing place upon a wharf of a private person, which it does not use for purposes of pecuniary gain, benefit or advantage or in performance of some public duty enjoined upon it by statute, it is not liable, after an occupation by it of such a landing place with the owner's permission for nine months, in an action upon an account annexed for use and occupation, since as matter of law the city cannot be made liable upon an implied contract to pay for what it had no power to make an express contract to pay for. Commercial Wharf Corporation v. Boston, 482.

Municipal Corporations (continued).

One who is invited or seeks to make contract with municipal corporation is chargeable with knowledge of extent of or lack of authority of corporation and its various officers to make such contract, see ante, 1.

Taxation of Property.

Real estate, held by city to apply income thereof to maintenance and improvement of its common and parks, is held upon valid public charitable trust and is exempt from taxation, see Tax, 6.

Whether city or town can tax real estate owned by itself, unless under St. 1909, c. 490, Part II. § 67, see Tax, 1.

Liability for Negligence at Public Celebration.

Town, which, exclusively for gratuitous amusement of public, undertakes celebration of fourth day of July under statutory authority, is not liable, as for maintenance of nuisance, for defect in public way, or in any other way, to one injured because of negligent way in which fireworks are discharged in such celebration, see Fireworks, 1-3.

Permits and Licenses.

Power of Legislature to authorize cities and towns or boards of public officers to issue permit or license for construction and maintenance of bridge over public street, see Constitutional Law, 4, 8.

Landing Place.

City council of Boston had no power to make certain lease from owner of "a location for a boat landing" in 1891, nor could any of its officers bind it to pay rent therefor, nor was it liable for use and occupation thereof after it had occupied under invalid lease signed by mayor in accordance with invalid vote of council, see Boston, 1, 2; ante, 6.

Waiver of Right to object to Proceedings in Equity.

Neither assessors nor collector of taxes of city or town nor inhabitants of town nor city council of city have power to consent to proceedings in equity to determine validity of tax assessed by assessors of town or city, see ante, 2, 3.

MURDER.

See HOMICIDE.

NEGLIGENCE.

Due Care of Plaintiff.

Of employee operating dieing or "dinking" machine in shoe factory and injured by beam coming down on hand which he had over die, see post, 16.

- Of employee attempting to stop, in method shown to him by superintendent, "tumbler" used for cleaning castings in factory, see post, 11.
- Of carpenter injured by fall of staging due to defect in bracket used by others in constructing staging, where defect was not apparent upon external examination, see post, 25.
- Of employee in machine shop injured by chip flying from edge of boring tool, see post, 22.
- Of employee in iron foundry helping to roll large wheel from mould, see post, 8.
- Of foreman of section gang of railroad company at work in switching yard, see post, 13.
- Of teamster in employ of dealer in hay sent to freight house of railroad company to get hay piled there, see post, 46.
- Of one driving horses on highway near to which was portable engine, see post, 55.
- Of one driving horse drawn vehicle carrying no lights upon narrow country road at night and run into by automobile, see post, 47, 48.
- Of traveller on crosswalk at intersection of two streets injured by team running upon him as he was waiting for automobile to pass, see post, 54.
- Of traveller on foot on crosswalk taking precautions against being run into by street car and struck by horse, see post, 50.
- Of one driving horse in light express wagon across parallel tracks of street railway and seeing car some distance away, see post, 58.
- Of passenger leaving street car which starts as she is doing so, see post, 41.
- Of fireman, riding free upon street railway car and in position not allowed by company's rules, see post, 83.
- Of former employee of street railway company riding on car as passenger through familiar crowded street and injured by pole of cart in street, see post, 38.
- Of traveller upon street, who was injured while crossing street railway tracks and, after having paused between parallel tracks to see if he can cross in front of approaching car and receiving what he thought was nod from motorman directing him to go ahead, see post, 51.
- Of person crossing street car tracks in city street with back turned toward approaching car, which was in sight for long distance, see post, 52.
- Evidence, which was held not to warrant finding of such wilful misconduct and wanton and reckless disregard of probable harmful consequences of his acts on part of motorman of street car as to make it unnecessary for person run into by car to show, in action against company, that he was in exercise of due care, see post, 31.
- Of chauffeur driving automobile on country road and approaching grade crossing of railroad with highway, see post, 56, 57.
- Of woman struck by automobile as she was in street passing obstruction on sidewalk, see post, 58.
- Question, whether negligence of traveller injured from falling into trench in public way contributed to injury, was held to be for jury at trial of action against city to recover for such injury, see WAY, 6.

Due Care of Plaintiff's Decedent.

Action for death of lineman in employ of telephone company, where it was held that there was no evidence that, when killed, decedent was in exercise of due care, see post, 59.

Due care of one killed while inspecting car in freight yard, see post, 14. Due care of foreman of section gang of railroad company killed while at work in yard, see post, 13.

Invited Person.

Action raising question of liability of railroad company for injuries received by teamster in employ of dealer in hay, who was sent by employer to get hay stored in freight house of company and was alleged to have been injured because of negligent piling of hay, see post, 46.

Licensee.

Whether street railway company is liable to fireman, travelling free upon car by permission of company, who was riding in place not permitted by company's rules and was injured in collision caused by negligence of company's servants and agents, see post, 32-34.

Trespasser.

Driver of caravan was held not to have been guilty of wanton or reckless misconduct because horses started after he had warned trespassing boy to get off from caravan and before boy had done so, see ante, 67.

Employer's Liability.

Assumption of risk by employee.

An employee cannot be held to have assumed the risk of an injury which
he receives unless he knew and appreciated, or ought reasonably to have
known and appreciated, the danger of it. Boyle v. Donovan, 196.

Case where foregoing principle was applied, see post, 12.

Whether teamster assumed risk of injury due to breaking of strap used to hold barrels on wagon, see post, 21.

Whether employee in grocery assumed risk of certain sugar barrels falling upon him, was held to be question for jury, see post, 9.

Whether employee in machine shop, who was injured by chip flying from edge of boring tool, had assumed risk of injury, was held under circumstances to be question for jury, see post, 22.

Risk of injury due to flying of particle from maul in machine shop, which was held to have been assumed by employee under circumstances, see post, 17.

Recovery, by employee in spinning mill, for personal injuries caused by slipping on soapy floor, was held to be barred because employee assumed risk of injury, and because slipperiness was due to negligence of fellow servant, see post, 27.

Questions regarding assumption of risk by plaintiff, which arose at trial of

Negligence (continued).

action against employer by one in charge of portable engine operating derrick used in tearing down building, who was injured through negligence of superintendent, see post, 3, 4, 6.

Defective ways, works, or machinery.

Sugar barrels piled one upon another at the side of a passageway in a grocery, where they are placed temporarily among other goods, are not a part of the ways of the proprietor of the store as that word is used in R. L. c. 106, § 71, cl. 1, now St. 1909, c. 514, § 127, cl. 1. Mungovan v. O'Keeffe, 304.

Action by longshoreman against employer for injuries caused by fall from staging due to its being raised by ascending bale of cotton, see post, 12.

As to liability of employer at common law for injuries to employee resulting from dangerous or defective machinery or appliances, see post, 16-23, 26.

Negligent superintendence.

- 8. The mere fact that an employee knows or should know that, if he does an act which his superintendent directs him to do in the way in which he is directed to do it, he runs a risk of injury if the superintendent causes the work to be done in a negligent manner, is not fatal to his recovering from his employer in case he thereby is injured, because he has a right to expect the superintendent to use due care in managing the work. Hutchinson v. Converse, 97.
- 4. An employee, who is in charge of a portable engine, which operates a derrick, and is assisting in the tearing down of a building, does not as a matter of law assume the risk of negligence of a superintendent in directing him to start his engine when doing so will cause a truss to be raised in such a manner as to strike an iron brace and cause it to break and fall upon the employee. *Ibid.*
- 5. If an employee, who is in charge of a portable engine, which operates a derrick, and is assisting in the tearing down of a building of a third person, is injured because his superintendent negligently directs him to start his engine and thus causes a truss to be raised against an iron brace, breaking the brace and causing it to fall upon the employee, his right of recovery against his employer is not affected by the fact that another cause of the breaking of the iron rod was a latent defect therein from crystallization or some other cause. *Ibid.*
- 6. If an employee, who was in charge of a portable engine, which operated a derrick, and was assisting in the tearing down of a building of a third person, was injured because his superintendent negligently directed him to start the engine and caused a truss to be raised against an iron brace, breaking the brace and causing it to fall upon the employee, his right of recovery against his employer is not affected by the fact that he saw the iron brace above the truss and yet raised the truss so that it hit the brace, if it also might be found that, when he set his engine in motion to raise the truss exactly as he was directed to do by the superintendent, and while the engine was in motion, he could not tell how high the truss was going or whether it would hit the brace. *Ibid*.

- 7. At the trial of an action by a workman against his employer for personal injuries alleged to have been received because of negligence of a superintendent of the defendant while the plaintiff was in charge of a portable engine and was helping to tear down a building, there was evidence tending to show that in the work being done it was necessary to raise a certain truss weighing two tons by the use of a derrick operated by the engine that the plaintiff was in charge of, that immediately above the truss was an iron pipe or brace, which, if it contained no flaw, would resist a strain of twenty tons, that the superintendent either saw the iron pipe or should have seen it and nevertheless communicated to the plaintiff a signal to start his engine, that thereby the truss was raised and the pipe was broken and fell upon the plaintiff, and that the plaintiff was not aware of the danger incident to obeying the order of his superior and starting the engine. Held, that the questions, whether the superintendent was negligent and whether such negligence caused the injury to the plaintiff, were for the jury. Hutchinson v. Converse, 97.
- 8. At the trial of an action for personal injuries received while the plaintiff was working in the defendant's foundry, there was evidence tending to show that, under the immediate supervision of a superintendent of the defendant, the plaintiff and two other men were engaged in rolling from a sand mould an iron wheel weighing fifteen hundred pounds which still was hot, they being supplied with cloths for handling it, when the superintendent called away one of the three who was walking backward holding the wheel in front of him, that the plaintiff and his remaining fellow workman continued to roll the wheel, but that the two "couldn't keep hold of the wheel and it fell" crushing the plaintiff's foot. Held, that there was evidence warranting a finding that the plaintiff was in the exercise of due care and that the superintendent was negligent in leaving an insufficient number of men to roll the wheel while it was hot. Vozella v. Osgood, 846.
- 9. At the trial of an action against the proprietor of a grocery by an employee therein to recover for personal injuries caused by the falling upon the plaintiff of a sugar barrel which was at the side of a passageway along which the plaintiff in the performance of his duties was rolling another barrel, there was evidence tending to show that the barrel was piled end for end upon another, its bottom not resting on the rim of the lower barrel, but at an angle upon its head, that the usual way of piling sugar barrels was upon their sides, that the floor where the barrels stood was being jarred by heavy trucking at the time when the barrel fell, and was so jarred whenever there was heavy trucking, that the piling of goods in the defendant's store was in charge of a superintendent and that the plaintiff first noticed just before the accident that the barrel which fell upon him was piled in an unusual way. There was no evidence that the superintendent was present when the barrel that fell upon the plaintiff was piled, but it appeared that it had been delivered at the store five days before. Held, that the questions, whether the plaintiff assumed the risk of the injury, and whether the superintendent was negligent, were for the jury. Mungovan v. O'Keeffe, 304.

- 10. In an action by an administrator against the employer of the plaintiff's intestate, for causing his conscious suffering and death by reason of a heavy iron porter bar striking him or falling upon him when a steam hammer crushed a brass casting, in one of the holes of which the bar had been left protruding, it was conceded that there was evidence of due care on the part of the intestate, and there was evidence that an acting superintendent of the defendant in charge of the work gave an order which caused the hammer to descend before the bar had been removed from the casting, knowing that there was danger to the workmen in crushing the casting before the bar was removed. The foreman testified that he intended to follow the usual and safer way and to have the hammer come down only far enough to hold the casting in place without resting the weight of the hammer upon it. It appeared that the order he gave was "Hold it, Billy," Billy being the operator of the hammer, and there was evidence that the words "hold it" meant that the hammer should be left or held down after it had been lowered upon the metal or casting to be crushed. It also appeared that the casting had been made brittle by subjecting it to great heat in the usual manner, and that when this order was given "the hammer descended down slowly until it came on the end of the casting and then in a little while the casting all crumbled away," and the accident happened. Held, that the giving by the acting superintendent of this order, the possible execution of which under the circumstances he must have known might be attended with grave danger to the defendant's workmen under his command, would justify a finding that he was negligent. Carroll v. Fore River Ship Building Co. 296.
- 11. At the trial of an action against a furnace manufacturing company by an employee in its factory to recover for personal injuries alleged to have been caused by negligence of a superintendent of the defendant, there was evidence tending to show the following facts: The plaintiff was of mature years and experienced in his work, which was cleaning castings in a machine called a tumbler. The tumbler was revolved by the use of cog wheels on a shaft connected with the power by pulleys. It could be stopped, when in order, either by a lever operating a friction clutch or by another lever which disengaged the cogs. Both methods of stopping having got out of order, the plaintiff reported that fact to the superintendent, who summoned a machinist. The machinist reported that he could not do anything with the tools at hand or while the speed was on, and went away. The superintendent thereupon came to the machine with a stick of wood and without any other instruction or warning directed the plaintiff to "put that stick in there and stop" the machine. The plaintiff often had seen the superintendent stop a machine with a stick and always successfully and without injury. He took the stick, went into a narrow, dark and cramped place behind the tumbler and shoved the stick between the cogs as he had seen the superintendent do previously. The wood broke and his hand was injured. Held, that the questions, whether the superintendent was negligent and whether the plaintiff was in the exercise of due care, were for the jury. Curren v. Magee Furnace Co. 229.

Negligence (continued).

12. At the trial of an action by a longshoreman against his employer for personal injuries alleged to have been received, while the plaintiff was assisting in unloading bales of cotton from a vessel into the second story of a warehouse, by reason of negligence of a superintendent of the defendant or of a defect in the ways, works or machinery used by the defendant, there was evidence that the plaintiff in the course of his duties was upon a staging built under the direction of the superintendent opposite the second story of the warehouse and that a crosspiece near the outer end of the staging was not fastened to the standards; that the bales under the superintendent's direction were being hoisted from the deck of the vessel by a winch, the hoisting cable from a boom running down so near to the end of the staging that the bales had to be given a swinging push by the "hooker-on" from the deck of the vessel to prevent their hitting the staging, that the use of a guy rope would have prevented the bales from hitting the staging, and that no guy rope was used. The accident was caused by an ascending bale striking the end of the staging, lifting or tipping it and causing it to fall with the plaintiff. There also was evidence that the plaintiff had helped to put up the staging and knew of its supports; but there was no evidence that a similar accident ever had occurred before, and the plaintiff testified that he never before had seen such an accident. Held, that the questions, whether the superintendent of the defendant was negligent, whether there was a defect in the ways, works or machinery for which the defendant was chargeable, and whether the plaintiff had assumed the risk of the injury, all were for the jury. Boyle v. Donovan, 196.

Action for conscious suffering and death of foreman of section gang of railroad company who was killed by being run over by train in switching yard, see post, 13.

Of person in charge of locomotive engine or train.

13. At the trial of an action by an administrator against a railroad corporation, the former employer of his intestate, to recover under R. L. c. 106, § 71, cl. 2, 3, § 72, for the conscious suffering and death of the intestate, there was evidence tending to show that the intestate when injured was a foreman of a section gang of the defendant and was working in a railroad yard, where there were frequent shiftings of cars and passing of locomotives, in repairing a track called "thirteen," adjoining and branching from another track called "fifteen"; that the conductor of a shifting crew of the defendant asked the intestate if he could set two cars in on track "thirteen," that the intestate answered, "Yes, you can, but you can't bother me any more until I have this job done," and that the conductor replied, "All right," and soon after put two cars on track "thirteen"; that half an hour later by the conductor's direction a car was shunted on to track "fifteen" which struck the intestate as he was working on track "thirteen" near where the two tracks joined and where they were from ten to eighteen inches apart. Held, that the case was one for the jury, since, in view of the conversation with the conductor, the plaintiff's intestate might have been found to have been relieved of the duty

- of watchfulness as to cars coming from the conductor's shifting crew. Regan v. Boston & Maine Railroad, 520.
- 14. In an action, by an administrator of the estate of a car inspector against a railroad corporation by which he was employed, for causing his death by reason of the negligence of a conductor of a switching engine in a freight yard of the defendant in running a car against a stationary car with a disabled brake, which the plaintiff's intestate was engaged in inspecting, and thus causing the disabled car to run over the intestate, if there is evidence warranting a finding that the intestate rightfully was standing between the rails of a track in the proper performance of his duty, that another car inspector was with him and that when two inspectors were together in this way and one of them was examining a car he had a right to rely upon the vigilance of the other, the question whether the intestate was in the exercise of due care is for the jury. Anthony v. New York, New Haven, & Hartford Railroad, 11.
- 15. In an action, by the administrator of the estate of a car inspector against a railroad corporation by which he was employed, for causing the death of the plaintiff's intestate, if there is evidence that a conductor in a freight yard of the defendant, who was in charge of the switches in the yard and of a switching engine and train, drove a car against a stationary disabled car, which the intestate was engaged in inspecting, standing in front of it between the rails of the track, when the conductor knew that the disabled car might be undergoing repairs and also knew that the car driven against it had no brakeman upon it to check or control its speed, and thus caused the disabled car to run over the plaintiff, there is evidence for the jury of negligence on the part of the conductor for which the defendant is responsible under R. L. c. 106, § 71, cl. 3, St. 1909, c. 514, § 127, cl. 3. Ibid.

Defective or dangerous machinery or appliances.

- 16. A workman in a shoe factory, operating a dieing out or "dinking" machine used for cutting leather into required shapes, which may run as fast as one hundred and fifteen times up and down in a minute, who, for the purpose of removing a die four or five inches high, which has stuck in the block, unnecessarily puts his hand on the top of the die, when he might remove the die perfectly well by taking hold of it lower down, and loses the end of his finger by the beam unexpectedly coming down on the die when his hand is on top of it, is not in the exercise of due care, and cannot recover from his employer for his injuries. Pendergast v. Burley & Stevens, 33.
- 17. One, who after having served an apprenticeship with a manufacturer enters the employ of such manufacturer as a qualified machinist with full knowledge that mauls made of a certain metal alloy are used in the work, from which, even when new, particles are likely to fly after a few hours' use without impairing the effectiveness of the appliance, so that the chance of injury from flying particles is inseparable from the method of conducting the work established at that factory, assumes by his contract of employment the risk of having an eye put out by such a flying particle. Cunningham v. Blake & Knowles Steam Pump Works, 68.

- 18. In an action by a machinist against his employer for the loss of an eye from a particle flying into it from a metal maul when it was being used near the plaintiff by a fellow servant, if it appears that the defendant provided a machinist, whose duty it was to provide new mauls whenever the workmen called for them, and it is not contended that the machinist was incompetent or that the defendant failed to furnish proper materials, no breach of duty toward the plaintiff has been shown either at common law or under the employers' liability act. Cunningham v. Blake & Knowles Steam Pump Works, 68.
- 19. In an action by a machinist against his employer for the loss of an eye from a particle flying into it from a metal maul when it was being used near the plaintiff by a fellow servant, if it appears that the fellow servant had mauls made for him as the occasion might require, that the maul which he was using at the time of the accident was unfit for service, because it was battered from use or because the handle socket had become enlarged and gave off scales, and that the fellow servant when he made use of this defective maul could have obtained a new one through means which the defendant provided, the plaintiff's injury, thus caused by the careless act of a fellow servant, cannot be attributed to the negligence of the defendant. Ibid.
- 20. At the trial of an action by an employee against his employer for personal injuries resulting from the falling upon the plaintiff of a derrick, there was evidence tending to show that a guy rope upon the derrick stood the principal strain when a weight of thirty-five hundred pounds was being lifted, that the guy rope was fastened to the top of the mast of the derrick by a hook hitched into an eyebolt five eighths of an inch in diameter, which passed through the mast and was held there by a nut, that the strain on the mast was toward one side of it and that because of the strain the bolt broke just inside of the mast; and experts testified that the method used by the defendant to support the mast was improper and stated in detail a proper method. Held, that the jury were warranted in finding that the defendant was negligent. Ford v. Cochrane Chemical Co. 376.
- 21. In an action by a teamster against his employer for personal injuries sustained by reason of a fall caused by the breaking of a strap which the plaintiff was tightening around some barrels on the tail board of his wagon, it appeared that the plaintiff had been in the employ of the defendant for about three weeks, that the strap was in two pieces, one attached on each side of the wagon, and commonly hung under the wagon buckled together in the middle, that the plaintiff had not used this strap until the time of the accident, when it broke as he first attempted to tighten it, that the defendant had no stock of straps on hand but purchased a new one whenever needed, and that he employed no inspector of wagons and harnesses. A part of the strap was in evidence and seemed from its appearance to have been subjected to somewhat prolonged and severe use. The defendant testified that he depended upon his driver to look after the wagon and all its attachments and to report any defects, but he did not say that he had notified the plaintiff of this, and it did not appear that the plaintiff understood that inspection of the appliance was

- a part of his work. Held, that it could not have been ruled as matter of law that the plaintiff assumed the obligation of inspection as a part of his service, and that the questions whether the plaintiff assumed the risk of such an accident and whether the defendant was negligent in failing to furnish safe appliances or to call the plaintiff's attention to their condition, were for the jury. Condon v. Gahm, 339.
- 22. If one, who is employed in a machine shop, having noticed a defective condition of a lathe at which he is set at work, calls it to the attention of the foreman of the shop, who directs him to perform other work, saying to him in response to his offer to make the necessary repairs, "I will have another man fix this immediately for you"; and if, a week later, the foreman directs the employee to resume his work upon the lathe, and the employee is injured because of a defect in the lathe which he easily could have discovered although it was not visually apparent, the employee cannot be said as a matter of law to have assumed the risk of such an injury, and, in an action against his employer for injuries so received, the questions, whether he assumed the risk of the injury, or failed to exercise due care, are for the jury. Hines v. Waltham Manuf. Co. 282.
- 28. At the trial of an action at common law against the proprietor of a machine shop by one who, while employed therein, lost the sight of an eye because of the flying off of a chip from the edge of a boring tool or reamer of a lathe upon which he had been set at work, there was evidence that the chip flew off because the tool, having been adjusted for the work that was being done by it on a cylinder, suddenly "dug in" to the cylinder owing to an irregular motion of the tool which was due to the worn condition of a nut on an automatic cross feed screw which controlled the movements of the tool, and that the condition of the tool was known to the foreman of the room where the plaintiff was working, who was the defendant's representative. Held, that there was evidence of negligence of the defendant in furnishing a defective lathe for the plaintiff's use. Ibid.
- Action by carpenter injured by falling of staging upon which he was working which was due to defective brackets used in its construction, where negligence of plaintiff's fellow employees in testing brackets was held not to bar recovery, see *post*, 26.
- As to statutory liability of employers for injuries to employee caused by certain defects in ways, works or machinery, see ante, 2, 12.

Dangerous place.

- 24. A dealer in hay, who sends a teamster in his employ to a freight house of a railroad corporation for bales of hay, owes no duty to such teamster previously to inspect the piles of bales of hay in the freight house to ascertain whether they are piled carefully so as not to fall on the teamster when he is passing a pile. Rooney v. Boston & Maine Railroad, 106.
- 25. A carpenter who is injured by the fall of a staging upon which he is at work, due to a decayed condition of a bracket, may be found to have been in the exercise of due care if he had nothing to do with the putting up of the staging and if the defect which caused it to fall was not one which a

reasonable external examination by him would have revealed. White v. Newborg, 279.

- 26. At the trial of an action at common law by a carpenter against his employer to recover for personal injuries caused by the falling of a staging upon which the plaintiff was working, there was evidence tending to show that the staging fell because of a decayed condition of one of the brackets of which it was built, that the defendant had owned a number of brackets. among which was the decayed one, for several years, and that his foreman had told him, before the staging was built, that they were "very bad brackets," to which the defendant had replied "You will have to patch them up the best way you can"; that the brackets then were tested, several were rejected, others were repaired and all of those not rejected necessarily were used; that fellow employees of the defendant subjected the brackets used to a test, which might have been found to have been inadequate to discover the defect which existed or to have been applied negligently. Held, that the duty to provide the plaintiff with a reasonably safe place to work was one personal to the defendant, which he could not delegate to another, and therefore that it was no defense that the accident was caused by the negligence of a fellow servant of the plaintiff and the question of the defendant's liability was for the jury. Ibid.
- 27. One, who is employed in a well lighted spinning mill and knows that, in dipping liquid soap from a tank into a trough where combed wool is washed, a fellow employee sometimes drops some of the soap upon the floor, and who in the course of his duties walks upon that part of the floor and is injured by slipping upon some soap which the fellow employee had dropped there and should have cleaned up, cannot recover from his employer although he did not know and had not been told what was the effect as to slipperiness of liquid soap upon the floor, the risk being an obvious one which he had assumed, and the accident being due to the carelessness of a fellow servant. Mann v. Moore Spinning Co. 341.
- 28. At the trial of an action by a carpenter against his employer for personal injuries, it appeared that the plaintiff had been a carpenter for thirty years and, when injured, was assisting in the remodelling of a building, which was being done under the defendant's personal supervision. In the course of the work certain brick walls had to be taken down and the plaintiff had helped to put up a fence around a sidewalk adjacent to the building, as to which he testified that he did not "know what it was for unless it was to keep people out and from getting hurt from anything falling from the building." At a later stage of the work the plaintiff was directed to move a temporary brace which was supporting the second floor of the building and to put in a stronger one and, while so doing, was struck on the head by a brick which had slipped from the control of a fellow workman who was helping to tear down the brick wall. There was no evidence which tended to show that the methods adopted by the defendant in tearing down the wall and disposing of the brick were unusual or improper. Held, that the defendant had a right to assume that the plaintiff could and would take care of himself so far as respected the usual and obvious dangers of employment, and that he needed no instruction

and warning; and that therefore, if the plaintiff's injury was caused by negligence of any one, it was by negligence of a fellow servant, for which the defendant was not liable. *McMahon* v. *Rice*, 597.

Negligence of fellow servant.

Personal injuries received by carpenter and due to brick falling upon him while he was helping in remodelling of building, which were held, if due to negligence of any one, to be due to negligence of fellow workman, see ante, 28.

Action by carpenter injured by falling of staging upon which he was working which was due to defective brackets used in its construction, where negligence of plaintiff's fellow employees in testing brackets was held not to bar recovery, see ante, 26.

Recovery, by employee in spinning mill, for personal injuries caused by slipping on soapy floor, was held to be barred because employee assumed risk of injury, and because slipperiness was due to negligence of fellow servant, see ante, 27.

Injury to employee in machine shop from piece flying from maul used by fellow servant was held to have been due to negligence of fellow servant for which employer was not liable to employee injured, see ante, 19.

Street Railway.

Injuries to persons on highway.

- 29. At the trial of an action against a street railway company for personal injuries received by the plaintiff by reason of a collision between a car of the defendant and a wagon of the plaintiff, there was evidence tending to show that, at the time of the collision, the plaintiff was going up a steep hill in the space between the street car rails because the rest of the street was too icy and slippery for travel, and that the motorman of the car had been running his car through the street in question for several years. The plaintiff offered to prove that, owing to the icy condition of the street, teams habitually travelled in the space between the street car rails on the hill in question. The evidence was excluded. Held, that the evidence should have been admitted, since it tended to show a continuous condition, the knowledge of which by the motorman had a direct bearing upon the question of his negligence. Nelson v. Old Colony Street Railway, 159.
- 80. If a traveller on a highway, who is driving one horse in a light express wagon, turns at a right angle to cross the parallel tracks of a street railway, when he sees on the farther track a car five hundred feet away stop to let off a passenger and then start toward him, and proceeds to walk his horse across the tracks, observing when he is on the first track that the car is from three hundred to three hundred and fifty feet away and has increased its speed considerably, and, when he himself is between the two tracks and the horse is over, sees the car two hundred feet away, and if the car is going at a high rate of speed which does not diminish until the car strikes one of the hind wheels of the wagon, and then the car runs one hundred feet farther without stopping, these facts, if shown in evidence in an action by the traveller against the corporation operating the

street railway, entitle the plaintiff to go to the jury on the questions whether he was in the exercise of due care and whether the motorman was negligent. Sellon v. Boston Elevated Railway, 507.

- 31. In an action against a street railway corporation for personal injuries from being run into by an electric car of the defendant, it appeared that the accident took place between 12.80 and 1 P. M. on a pleasant day in June upon the main street of a small country village along which cars of the defendant were accustomed to run "pretty fast," that the car was going down a hill toward an intersecting street, that, when about seven hundred feet from the cross street, the motorman had seen the plaintiff proceeding from the main street into the intersecting street and had lost sight of him, that the motorman kept his eyes and attention on the track before him but did not sound a whistle or ring a gong, although the car was provided with both and a rule of the defendant required him to do so in approaching a cross street, that when about one hundred feet from the cross street he saw the plaintiff returning and about to cross the tracks and that, although he at once applied air brakes and reversed his power, he was unable to stop the car until it had struck the plaintiff, and hurled him forty feet and had continued on its course over a level track with the air brakes set for about two hundred and ten feet. There was no evidence that the plaintiff was in the exercise of due care. Held, that the excessive speed of the car and the failure to sound the whistle or gong were not evidence of such wilful misconduct and such wanton and reckless disregard of the probable harmful consequences of his acts on the part of the motorman as to entitle the plaintiff to go to the jury without evidence of due care on his part. Willis v. Boston & Northern Street Railway, 589.
- Action by traveller upon street against street railway company for injuries caused by plaintiff being run into by car as he was crossing street on crosswalk after he had paused between parallel tracks to see if he could pass in front of approaching car and had thought motorman nodded to him to go forward, see post, 51.

Injury to licensee on car.

- 32. If a member of the fire department of a city, who is being transported free on an open electric car of a corporation operating a street railway, is injured by a collision while he is standing on the left hand running board of the car outside the side bar, which is lowered, having taken his place there knowing of a rule of the corporation that members of the fire department shall be transported free on open cars only on the rear platforms, and knowing also of another rule of the corporation that when the side bar of an open car is in use on the left hand side no person shall be allowed to stand on the left hand running board, he is at most a licensee, to whom the corporation owes no duty except to refrain from injuring him intentionally or wantonly. Twiss v. Boston Elevated Railway, 108.
- 88. It seems that, if a person, who is being transported as a passenger on an open electric car of a corporation operating a street railway, stands on the left hand running board of the car outside the side bar, which is lowered knowing of a rule of the corporation, that when the side bar of an open

car is in use on the left hand side no person shall be allowed to stand on the left hand running board, and is injured by a collision which would not have hurt him if he had not been standing on the left hand running board, he cannot recover from the corporation on showing that the accident was due to the negligence of the servants of the corporation, because his violation of the rule must be regarded as a negligent act which contributed directly to the injury which he received. Twiss v. Boston Elevated Railway, 108.

84. It seems that, if the conductor of an open electric car of a corporation operating a street railway sees a member of the fire department in his uniform getting upon the left hand running board of the car outside the side bar, which is lowered, both of them knowing of a rule of the corporation that members of the fire department shall be transported free on open cars only on the rear platforms, and both of them also knowing of another rule of the corporation that when the side bar of an open car is in use on the left hand side no person shall be allowed to stand on the left hand running board, and under these circumstances the conductor nods to the member of the fire department as he gets upon the car, it does not matter whether the nod of the conductor was intended merely as a sign of recognition or whether it was intended as an acquiescence in the member of the fire department taking his position on the left hand running board, because it is not in the power of a conductor of a corporation operating a street railway to waive such rules of the corporation. Ibid.

Injuries to passengers: when entering car.

35. At the trial of an action by a woman against a street railway company, if the plaintiff is the only witness on the question of liability and in her direct examination testifies that, while in full sight of the conductor, she was attempting to board a box electric street car of the defendant when it was at a standstill and had put her foot upon the second step of the rear entrance and had hold of the handle of the door, the conductor gave the signal for the starting of the car and the car started so suddenly as to break her hold and throw her down and injure her, the questions, whether the plaintiff was in the exercise of due care, and whether the motorman and the conductor, either or both, were negligent, are for the jury. McCarthy v. Boston Elevated Railway, 512.

Injuries to passengers: electric shock.

36. At the trial of an action for personal injuries by a passenger against a street railway company, the plaintiff testified that, as he was sitting with his back toward the car window, he felt a blow or shock and lost consciousness, which he regained in a physician's office, that he knew what an electric shock felt like and that the feeling he had when injured was such as he had experienced when he had had an electric shock, that one of his arms was broken in three places and that the next day there were water blisters all up and down it, that the physician who attended him, who died before the trial, had told him that he was suffering from a severe electric shock. There also was evidence tending to show that the accident occurred upon a bridge upon which the defendant maintained double . Vol. 208.

Megligance (continued).

tracks which in the middle of the bridge were farther separated than at the ends, that the plaintiff, when he lost consciousness, was sitting on the side of the car toward the other track with an iron grating, with which his body was in contact, at his back, and that a car was passing at a point where the tracks curved toward each other, that the car upon which the plaintiff was a passenger was of the semi-convertible type and the body of the car was so pivoted that it would swing as the car passed over a curve, that as the two cars passed there was a noise "as though the cars came together or something was rubbing like r-r-r-r-r." An electrical expert. called by the plaintiff, testified that in his opinion ends of cars going in opposite directions at the point described might come in collision and that, if they did, and the insulation of the cars was imperfect, electricity from one car could charge the iron grating on the other and one touching the grating could receive such injuries as the plaintiff testified that he had received. Held, that the case was one for the jury on the question of the negligence of the defendant or its employees, because the testimony of the plaintiff called for an application of the doctrine res ipea loquitur, and because the fact that the plaintiff attempted to explain the accident did not deprive him of the right to rely on that doctrine. McDonough v. Boston Elevated Railway, 486.

Injuries to passengers: from falling side bar of open car.

87. At the trial of an action against a corporation operating a street railway, for personal injuries caused by the side bar of an open electric car of the defendant, in which the plaintiff was a passenger, falling upon the plaintiff's shoulder, it appeared that at the time of the accident the plaintiff was sitting at the left hand end of the front seat of the car, and that, as the car was leaving a subway to go out upon a surface track, the bar dropped and struck the plaintiff's shoulder. There was no question but that the plaintiff was in the exercise of due care. The plaintiff was the only witness on his side, and testified that he did not see the conductor or the motorman lower the bar or see any one else near it until he was struck by it. It appeared that it was the duty of the conductor and the motorman to lower the bar on the left hand side on every trip at about the place where the plaintiff said that the car was when the bar fell. The conductor and the motorman both testified for the defendant and disclaimed any knowledge of such an accident or such an occasion as the plaintiff described. Held, that there was no adequate explanation of the falling of the bar except through the act or neglect of the conductor or the motorman, or both, in causing or permitting it to fall, and that negligence on their part was a legitimate inference from the happening of the accident as described in the plaintiff's testimony, and would justify a finding that the defendant was liable. Whitney v. Boston Elevated Railway, 115.

Injuries to passengers: from protruding objects in street.

38. If one, who had been employed by a street railway company as a conductor for three years, becomes a passenger upon an open electric street car of the same company, takes his position upon the running board and,



as the car passes through a very busy city street with which he is entirely familiar and in which there is a space of but eight feet and two inches from the running board to the curbstone, stands holding to the uprights of the car, facing the car's interior and not looking out to see whether he is in danger of coming into contact with teams or obstructions in the street, and is struck by the pole of a cart which he easily could have seen had he looked in the direction in which the car was going, and could have avoided by temporarily stepping into the car between the seats or drawing himself farther into the car, he cannot be said to have been in the exercise of due care, since, with a knowledge of the dangers attending his position, he disregarded them. Heshion v. Boston Elevated Railway, 117.

Injuries to passengers: collisions.

39. If, at the trial of an action against a street railway company for personal injuries alleged to have been received while the plaintiff was a passenger on a car of the defendant and to have been caused by the car running into an ice wagon of a third person, there is evidence that the track was straight for a considerable distance before the car reached the wagon, that the wagon "was not going" and that the car struck some part of it, the case is one for the jury. Niland v. Boston Elevated Railway, 476.

Injuries to passengers: car leaving track.

40. At the trial of an action against a corporation operating a street railway, for personal injuries sustained when the plaintiff was a passenger on a car of the defendant, which left the rails upon a disused railroad bridge, went down a bank a distance of seven feet and turned over on its side, the conductor of the car testified that as the car left the bridge and began to go down grade he "observed a grating sound and immediately the car tipped . . . took an unusual tilt and settled on its side," and it went off the bank "immediately." From another portion of the testimony of the same witness the defendant's counsel contended that the conductor made the statement that in his opinion the cause of the accident was oscillation. It was said, that a jury would be warranted in finding that the conductor would not have stated that in his opinion the cause of the accident was oscillation if he had heard the grating sound to which he testified. Boyle v. Boston Elevated Railway, 41.

Injuries to passengers: on leaving car.

41. If after a street car has come to a full stop the conductor makes way for a woman passenger to get out and she starts to do so, but while she is stepping from the car it starts suddenly and she is thrown to the ground and is injured, these facts are evidence of due care on the part of the passenger and of negligence on the part of either the conductor or the motorman of the car. McDernott v. Boston Elevated Railway, 104.

Action of judge, who presided at trial of action against street railway company for personal injuries alleged to have been received by plaintiff as she was alighting from car, in setting aside verdict, was held not to have been improper exercise of discretion, see PRACTICE, CIVIL, 26.

Evidence.

Certain declarations in writing by one who saw accident to plaintiff in action against street railway company, which were made in answer to letter from street railway company, were held to be admissible at trial of action upon proof of death of declarant, see Evidence, 10, 11.

Elevated Railway.

42. At the trial of an action against an elevated railway company to recover for personal injuries received by the plaintiff and due to his slipping upon a banana peel on the upper platform of a station of the defendant as he was following an employee of the defendant who was directing him to another car, there was evidence tending to show that it was the duty of certain employees of the defendant, one of whom was at the station all the time, to observe and to remove whatever was upon the platform to interfere with the safety of travellers. The description of the banana peel by different witnesses was that it "felt dry and gritty as if there were dirt upon it," as if "tramped over a good deal," as "flattened down, and black in color," "every bit of it was black, there wasn't a particle of yellow," that it was "black, flattened out and gritty." Held, that the question of the defendant's liability was for the jury, who might have found that the banana peel had been upon the platform for a considerable period of time and had been left there negligently by employees of the defendant in violation of the defendant's duty to keep its station reasonably safe for its passengers. Anjou v. Boston Elevated Railway, 273.

Railroad.

Injury to passenger.

- 43. At the trial of an action by a woman passenger against a railroad company for personal injuries caused by the plaintiff being pushed off the platform of a car as she was alighting in a station of the defendant, if there is evidence tending to show that as the plaintiff stood on the platform of the car she waited until the skirts of a woman in front of her were off the top stairs, and that then as she put one foot down to the top step she was pushed off the car by a man behind her, that the car was crowded before it reached the station, but that there were only twenty persons behind the plaintiff as she passed out of the car, that there was a good deal of pushing and jostling among them, and that that train usually was crowded; and if there is no evidence that on previous occasions the passengers had jostled or pushed each other, a finding of negligence on the part of the defendant and its servants in failing to guard its passengers from injury due to the conduct of crowds would not be warranted, both because on the evidence there was no reason why the defendant should have anticipated that the person who pushed the plaintiff would do so, and because the overcrowding of the car had ceased before the plaintiff was pushed. Marr v. Boston & Maine Railroad, 446.
- 44. At the trial of an action by a woman passenger against a railroad company for personal injuries caused by the plaintiff being pushed off the

platform of a car as she was alighting in a station of the defendant, if there is testimony that the part of the platform of the station where the car stopped was dark, and the plaintiff testifies that she waited until the skirts of a woman who preceded her "were off the top stairs so that I could step down," and that as she was stepping down to the top step a man behind her pushed her, and it is not contended that he did so because the place was dark, the plaintiff has failed to present evidence that negligence of the defendant in not keeping that part of the station light caused her injuries, both because it appears that the place was light enough for the plaintiff to see the skirts of the woman in front of her, and because the pushing of the man behind her, and not the darkness of the station, caused the accident. Marr v. Boston & Maine Railroad, 446.

Injury to person in freight yard.

45. If a railroad corporation receives a freight car, which is loaded with fixtures for a restaurant conducted by a lessee of the corporation in its station, and places the car on the track third from the station opposite the door of the restaurant, which is the most convenient place for unloading the fixtures but also is a place attended with great danger because the two intervening tracks are the main tracks of a division of the railroad, on which trains pass frequently in opposite directions, it becomes the duty of the railroad corporation to take the precautions necessary to protect the men engaged in the work of unloading the car after the unloading begins and while it lasts, but this responsibility does not arise until the time for unloading comes, and, if before the consignee of the fixtures or the seller of the fixtures, who has agreed to unload and install them, has been notified by the railroad corporation that the car is ready for unloading, the seller of the fixtures orders his workmen to start to unload it and one of the workmen on his way to the car is run over by a train on one of intervening main tracks, there is no negligence or evidence of negligence on the part of the railroad corporation. In such a case the fact that the car has been brought up to the place from which it ultimately is to be unloaded does not justify the consignee in inferring that the time for unloading has come. Hyslop v. Boston & Maine Railroad, 862.

Action for conscious suffering and death of car inspector due to car which he was inspecting being run into by train in freight yard, see ante, 14, 15.

Injury to person in freight house.

46. In an action by a teamster in the employ of a dealer in hay against a railroad corporation, for personal injuries sustained when the plaintiff had been sent by his employer to a freight house of the defendant for nine bales of hay and, after he had put two bales on his team and was rolling out the third, a bale of hay fell upon him from a pile of bales as he was passing it, where there is evidence tending to show that the manner in which the bales were piled was improper and dangerous and rendered them likely to fall, so that the question of the defendant's negligence is for the jury, the questions, whether the plaintiff in the exercise of due

Negligence (continued).

care should have observed the manner in which the hay was piled and whether the way in which he took out the three bales was a proper one and, if it was not, whether it contributed to the accident, also are for the jury. Rosney v. Boston & Maine Railroad, 106.

Injury to travellers on highway at grade crossing.

Certain acts of directors and of certain officers of two corporations which were held to constitute sale by one corporation to other of automobile so that, upon vendee corporation using automobile upon highway without again registering it, persons in it became traspassers upon highway and not entitled to recover for injuries resulting from ordinary negligence of agents of railroad who ran into automobile at grade crossing, see Sale, 1-3; EVIDENCE, 9.

Liability for damage by fire.

Action against railroad company to enforce alleged common law liability for causing fire which burned cottage of plaintiff in Rhode Island, see Neg-LIGENCE, 64, 65.

In Use of Highway.

- 47. In cases of collision between travellers upon the highway where the law requires that each traveller shall use the way with due regard for the rights of every other, the question of the care or negligence of either traveller, depending for solution as it does upon a variety of circumstances about any one of which the evidence may be conflicting, generally is for the jury. Chandler v. Matheson Co. of Boston, 569.
- 48. At the trial of an action for personal injuries and damages to the plaintiff's horse and wagon, caused by a collision with an automobile driven by an employee of the defendant, it appeared that the accident happened on a country road between ten and eleven o'clock at night, and that the plaintiff's team carried no lights; and there was evidence tending to show that the plaintiff saw the lights carried by the defendant's automobile a long way off on a straight part of the road and turned to one side of the road and more than half way out of the travelled part of the way and was standing still and waiting for the automobile to pass, when the collision occurred, and that there was not room for two vehicles to pass in the commonly travelled part of the way. Held, that the questions, whether the plaintiff was exercising due care and whether the defendant's employee was negligent, were for the jury. Ibid.
- 49. A traveller on foot, who is passing over a crosswalk near the junction of two city streets, where the conditions are not such as to call for unusual care, is not necessarily negligent in failing to look and listen for approaching horses and wagons. Donovan v. Bernhard, 181.
- 50. If a traveller on foot, when passing over a crosswalk near the junction of two city streets, sees an electric car approaching at his right hand and there is nothing so near on his left hand as to require him to take precautions against it, and while thus proceeding he is run over by a horse which is being driven rapidly from the left hand side by an inattentive driver, in

- an action by the traveller against the employer of the driver for the injuries thus caused, the question of the due care of the plaintiff is for the jury. *Donovan* v. *Bernhard*, 181.
- 51. A traveller upon a street properly can be found to be in the exercise of due care if, in crossing a street upon a crosswalk, he reaches a position between parallel tracks of a street railway, sees a car between twenty and thirty feet away on the track in front of him approaching at from eight to ten miles an hour, pauses to see if he will have a chance to go by, looks at the motorman, sees him give a distinct nod in the direction toward which the traveller is going, and thereupon starts on ahead of the car, keeping his eyes on the motorman whom he then sees turn his hand and thinks that he turns it in an effort to stop the car, which nevertheless runs into the traveller after he had taken two steps from his former position between the tracks. Cuddy v. Boston Elevated Railway, 134.
- 52. A person in command of his senses, who, in crossing a city street, containing double tracks of a street railway over which he knows cars run "pretty often," does so at a point two or three hundred feet from the nearest crosswalk and in a diagonal direction with his back partially turned toward an approaching car, which, if he had looked, he could have seen for a long way, and neither looks nor listens for an approaching car and is run over, as a matter of law is not taking the precautions which the circumstances call for and is not in the exercise of due care. Berg v. Old Colony Street Railway, 434.
- 53. Where a traveller on a highway, who is driving a horse in a light wagon, attempts to cross the parallel tracks of a street railway, on the second of which a car is approaching rapidly although some distance away, and where for a long distance the street is straight, the view is unobstructed and there are no diverting or confusing surroundings to prevent the motorman from seeing him and retarding the car sufficiently to avoid a collision, it cannot be said that such traveller as matter of law fails to exercise due care because he miscalculates the time required for passing safely in front of the car and one of the hind wheels of his wagon is struck by the car. Sellon v. Boston Elevated Railway, 507.
- 54. At the trial of an action for injuries received from being run over by the defendant's horse and wagon, it appeared that the place of the accident was at the intersection of two streets which ran respectively east and west and north and south, and there was evidence tending to show that the plaintiff, having looked in each direction, had started upon the crosswalk across the street running east and west and had reached a point half way across, when, seeing an automobile approaching, he had stopped to let it pass, and then, "before he knew it," he was struck by the defendant's team, which had come from the other street from the direction in which the plaintiff was facing and which, according to various witnesses, was going "quite" or "pretty" fast; and one witness testified that after the plaintiff was run over the defendant's horse "went" for some distance, "was caught, turned around, came back, and then went... in the direction in which it was coming prior to turning the corner and striking" the plaintiff. Held, that the questions whether the plaintiff was in the exer-

cise of due care and whether the defendant's horse was being managed with proper care, were for the jury. Keaveny v. Moran, 277.

- 55. The driver of four horses attached to a heavily loaded wagon, who in passing through a street of a city sees ahead of him on his right an open trench unguarded and on his left a temporary shelter in which a portable engine is maintained on a portion of the highway for use in the erection of a building, if his horses had not shown signs of fright and there is room in the street for his team to pass safely between the trench and the temporary shelter of the engine, and he has no reason to anticipate that the engineer in charge of the engine will start it up suddenly at the moment that his horses are passing near it, cannot be said as matter of law to be negligent in attempting to drive between the trench and the engine, although while he is doing so the sudden starting of the engine frightens the horses and makes them uncontrollable, so that they turn a wheel of the wagon into the trench and he is thrown from his seat and injured. Igo v. Cambridge, 571.
- Questions, whether plaintiff was in exercise of due care and whether defendant's chauffeur was negligent, were held to be for jury in action by woman who was struck by automobile in street, see *post*, 58.

Action for personal injuries caused to driver of team frightened by noise of portable engine near highway, see ante, 55; post, 60, 61.

Evidence as to habitual use by travellers of street railway tracks on icy hill street, which was held to be admissible in action by traveller there, who was injured by being run into by street railway car, see ante, 29.

In Use of Automobile.

- 56. A person driving an automobile on a country road and approaching a grade crossing of a railroad with the road, which has no gates or a flagman, is not in the exercise of due care unless he looks and listens for approaching trains in a reasonable way before attempting to cross the railroad, and the fact that he can stop near the track for this purpose with greater convenience than can the driver of a horse will be considered in passing upon the question of the reasonableness of the way in which he looks and listens. Chase v. New York Central & Hudson River Railroad, 137.
- 57. If the driver of an automobile, who is approaching an open grade crossing of a railroad with the highway on which he is travelling, is perfectly familiar with the crossing and knows that a train may come from either direction at any moment, and with this knowledge drives his car within about fifteen feet of the track before he perceives that a train is approaching on it and then attempts to cross and is run over by the train, he is not in the exercise of due care, even if he was running his car at the rate of only from twelve to fifteen miles an hour until he was very close to the track when he reduced his speed to eight miles an hour, and even if it is possible, although not probable, that the train was running faster than twenty-five miles an hour and that no bell was rung or whistle blown as the train approached the crossing. *Ibid*.
- 58. At the trial of an action against the owner of an automobile for personal injuries caused by the plaintiff being run against by the automobile, there

was evidence tending to prove the following facts: The plaintiff had been walking upon a sidewalk, which was upon the left hand side of a highway as she proceeded, when she came to a barrier cutting off the entire sidewalk, and in the street against the sidewalk at that point a two horse dray stood facing her. She therefore turned into the street to go around the dray, as she saw other persons doing, and had reached a point "just beyond the horses' heads" when she heard the horn of the defendant's automobile about sixty feet away, and judged that the automobile would pass her "all right." She stood perfectly still where she was against the front wheel of the dray and the front wheel of the automobile passed her without hitting her, and then the automobile swerved and either the mud guard over the rear wheel or the canopy struck her. The only persons in the automobile were the defendant's wife and his chauffeur, who was running the car, and both of them testified that they did not see the plaintiff and did not know that an accident to the plaintiff had happened until they were told of it afterwards. Held, that the questions, whether the plaintiff was in the exercise of due care when injured, and whether the defendant's chauffeur was negligent, were for the jury. Gray v. Batchelder, 441.

Action for personal injuries and damage to plaintiff's horse and wagon resulting from collision with automobile of defendant on dark narrow country road, see ante, 47, 48.

In Use of Electricity.

59. In an action by an administrator against an electric lighting company for the death of the plaintiff's intestate, there was evidence tending to show the following facts: The plaintiff's intestate, when killed, was an employee of a telephone company, and, for the purpose of working upon wires of his employer which were in a cable box, was upon a pole which also held a high tension wire of the defendant so placed that when the cover of the cable box was opened and raised, it would strike the defendant's wire which was on the left of the box as one faced it. The cable box ordinarily was kept closed. The plaintiff's intestate was seen to fall from the pole, and was found to be dead with electricity burns on the back of his left hand between the second and third fingers. The wire of the defendant immediately after the accident was found to be exposed through the insulation at the point where the box cover would come in contact with it, and to have a piece of flesh "sizzling" upon it, while the cable box was found with its cover unfastened, but without anything having been done to its interior. There was no other evidence as to what the plaintiff's intestate was doing when he was killed. Held, that there was no such evidence of due care on the part of the plaintiff's intestate as to warrant a verdict against the defendant. McDonald v. Edison Electric Illuminating Co. 199.

Actions against street railway company for injuries received by passenger, where plaintiff contended that he was shocked by electricity communicated to car upon which he was from passing car, and doctrine, res ipsa loquitur, was applied, see ante, 86; post, 68.

In Use of Portable Engine.

Injury to traveller on highway.

- 60. A contractor, who is granted a permit by the proper officers of a city to maintain and operate a portable engine in a temporary shelter upon a highway of the city, which is not closed to public travel, must use reasonable care not to operate the engine in a manner that is likely to frighten horses when being driven near it by travellers on the highway. Igo v. Cambridge, 571.
- 61. In an action against a contractor for personal injuries alleged to have been sustained by reason of the negligence of an engineer of the defendant in suddenly starting a portable engine maintained under a permit from a city in a temporary shelter on a highway of the city, at the moment when the horses driven by the plaintiff were passing near it between the temporary shelter and an open trench, thus causing the horses to become uncontrollable and to turn one of the wheels of the wagon into the trench so that the plaintiff was thrown from his seat and injured, it is no defense that the accident would not have happened if the trench in the highway had not been left by the city open and unguarded. *Ibid.*

Injury to employee running portable engine.

Action by employee against employer for injuries received because of negligence of superintendent while plaintiff was operating portable engine being used with derrick in tearing down building, see ante, 8-7.

Of Driver of Team.

Driver of caravan was held not to have been guilty of wanton or reckless misconduct because horses started after he had warned trespassing boy to get off from caravan and before boy had done so, see post, 67.

In Construction of Derrick.

Action by employee for injuries caused by falling of derrick due to defective method of fastening guy rope to mast, see ante, 20.

In a Foundry, Machine Shop, Mill or Factory.

Action by employee in foundry for injuries received while, with others, plaintiff was rolling large iron wheel from mould, and due to superintendent's causing one of employees who was assisting plaintiff to cease to do so, see ante, 8.

Action by employee in machine shop for injuries caused by particle flying from maul being used by fellow servant, see ante, 17-19.

Action by employee for injury caused by chip flying from edge of boring tool, see ante, 22, 23.

Action for conscious suffering and death of one injured in shipbuilding works by iron porter bar falling upon him in forge room, see ante, 10.

Recovery, by employee in spinning mill, for personal injuries caused by slipperiness of soapy floor, was held to be barred because employee

assumed risk of injury, and because slipperiness was due to negligence of fellow servant, see ante, 27.

Action by employee in shoe factory for injuries caused by beam of dieing or "dinking" machine coming down on hand which he had over die, see ante, 16.

Action by employee in factory for personal injuries received by him while he was trying to stop, in way shown to him by superintendent, "tumbler" used to clean castings, see ante, 11.

In Railroad Yard.

Action for conscious suffering and death of foreman of section gang of railroad company who was killed by being run over by train in switching vard, see ante, 13.

Action for conscious suffering and death of car inspector due to car which he was inspecting being run into by train in freight yard, see ante, 14, 15.

In Freight House.

Action, raising question of liability of dealer in hay or of railroad company for injuries received by teamster in dealer's employ, who was sent by him to get hay stored in freight house of company and was injured because of alleged negligent piling of hay in freight house, see ante, 24, 46.

In constructing, remodelling, or tearing down Building.

Action by employee against employer for injuries received because of negligence of superintendent while plaintiff was operating portable engine being used with derrick in tearing down building, see ante, 3-7.

Action by carpenter injured by falling of staging upon which he was working which was due to defective brackets used in its construction, where negligence of plaintiff's fellow employees in testing brackets was held not to bar recovery, see ante, 26.

Personal injuries received by carpenter and due to brick falling upon him while he was helping in remodelling of building, which were held, if due to negligence of any one, to be due to negligence of fellow workman, see ante, 28.

Of one owning or controlling Real Estate.

- 62. In an action by a woman against a corporation maintaining a large department store, for personal injuries caused by the plaintiff's heel slipping from the narrow part of a step of a staircase at a point where three steps radiated from a post to make a turn in the staircase, by which the plaintiff was descending from the second floor to the first floor of the building, where it appeared that the stairs were lighted by a large are electric light, it was held, that the maintenance of such a staircase, well lighted, was no evidence of negligence, the winding of the stairs in this manner being an ordinary method of construction well known and in common use in stores and office buildings. Chick v. Gilchrist Co. 188.
- 63. At the trial of an action by a woman against a corporation maintaining a large department store, for personal injuries caused by the plaintiff's heel

slipping on the narrow part of a step of a staircase where the stairs wound around a post to make a turn, the plaintiff cannot be allowed to show by an expert, after having shown the architectural features of the staircase and the conditions under which it was used, that such stairs under such conditions "were not regarded as safe." Chick v. Gilchrist Co. 183.

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Action against owner of building, who retained control of roof, for injuries caused to traveller on adjoining street by falling upon him of icicle caused by water flowing from leak in conductor pipe and freezing, see Nuisance, 1.

In causing Fire.

- 64. By the common law of this Commonwealth, apart from the successive statutes which have changed it, the mere fact that a fire, which destroyed property, was started by a spark from a locomotive engine is not prima facie evidence of negligence on the part of a railroad corporation which was operating the engine. Wallace v. New York, New Haven, & Hartford Railroad, 16.
- 65. In an action against a railroad corporation, at common law, for using a locomotive engine on its railroad in the State of Rhode Island so negligently that "cinders, sparks and burning matter" were alleged to have been "thrown therefrom," causing the plaintiff's cottage to be destroyed by fire, there was evidence on which it could have been found that the plaintiff's cottage was five hundred and eighty-six feet from the track of the defendant's railroad, that a part of the intervening ground was within the location of the defendant's railroad and a part of it was without, and that, while a train of the defendant lawfully was proceeding on a track of the defendant's railroad, a spark from the locomotive engine fell upon the location of the defendant's road, where there was "quite a lot of heavy grass [and] weeds," and set fire to the grass, that the fire was spread by a high wind and finally reached and destroyed the plaintiff's cottage. There was no evidence that the locomotive engine was emitting a great or unusual quantity of fire or sparks or burning matter and no evidence in regard to its condition and equipment. It did not appear that there was any statute of the State of Rhode Island affecting the defendant's liability and there was no evidence that the common law of that State differed from the common law of this Commonwealth. Held, that there was no evidence of negligence, and that a verdict should be ordered for the defendant. Ibid.

In causing Noise.

Action for personal injuries caused to driver of team frightened by noise of portable engine near highway, see ante, 55, 60, 61.

- Of Employees of Owner of Real Estate in assisting Employees of Contractor to remove Machinery.
- 66. In an action for personal injuries alleged to have been caused by the negligence of the servants of the defendant, it appeared that the plaintiff, together with a helper, was sent by his employer to take out an old metal

shaft in the place of business of the defendant and to install a new one inits stead, that when the plaintiff was engaged in taking out the old shaft, which weighed eight hundred pounds, there were present five or six workmen of the defendant, including a man who was described as a foreman of the machine shop, and it could have been found that they were there by the direction or authority of the defendant, that the shaft ran through a hole in a brick wall between the main building and a shed, and, having been detached, had dropped down upon the brick which formed the lower part of the hole in the wall, that in the course of the work it became necessary to tip down the end of the shaft in the main building, that for this purpose one of the defendant's men gave the order "Now bear down on it," that the plaintiff, who was in the shed with one of the defendant's workmen, did not hear this order, that the plaintiff's helper, who was in the main building with the rest of the defendant's workmen and their foreman and wanted to get out of the way before the shaft was tipped, said "Hold on a minute," that the plaintiff heard him and answered "All right. Here, take this light," and stooped down and passed a light through the hole, that the defendant's men, who it did not appear had heard anything said by the plaintiff, bore down on the shaft as they had been told to do, and that the shaft struck the plaintiff under the arm and forced his arm back against the brick wall, causing the injuries sued for. There was nothing to show that the defendant's men were to wait for an order from the plaintiff before bearing down on the end of the shaft in the main building. Held, that there was no evidence of negligence on the part of the defendant's servants, who in bearing down upon the shaft did only what they were expected to do, there being nothing to show that when the order to bear down was given either he who gave it or those who obeyed it had any reason to anticipate that the plaintiff would put his arm through the hole as he did. Chandler v. John P. Squire & Co. 408.

Wanton or Reckless Misconduct.

67. Evidence that the driver of a caravan drawn by two horses ordered a boy five years of age, who was upon the caravan without his permission, to leave it, that he stopped the caravan for the boy to do so and that, with the reins in his hands, he stood looking at the boy, and not at the horses, as the boy was getting over one of the rear wheels, when the horses started and the boy was run over, has no tendency to show that the injury to the boy was caused by reckless or wanton misconduct on the part of the driver, and therefore will not support an action by the boy against the driver's employer to recover for the injuries thus received. Gallagher v. O'Riorden, 275.

Evidence, which was held not to warrant finding of such wilful misconduct and wanton and reckless disregard of probable harmful consequences of his acts on part of motorman of street car as to make it unnecessary for person run into by car to show, in action against company, that he was in exercise of due care, see ante, 31.

Gross.

Where gross or wilful negligence of person injured or killed at grade crossing of railroad with highway is defense to action against railroad company under St. 1906, c. 463, Part II. § 245, and whether in certain case verdict should have been ordered for defendant on ground that such defense was made out, see RAILROAD, 2-5.

Causing Death.

Action for conscious suffering and death of foreman of section gang while at work in railroad yard, see ante, 18.

Action for conscious suffering and death of car inspector due to car which he was inspecting being run into by train in freight yard, see ante, 14, 15. Action for conscious suffering and death of one injured in shipbuilding works by iron porter bar falling upon him in forge room, see ante, 10. Action for death of lineman in employ of telephone company, where it was held that there was no evidence that, when killed, decedent was in exer-

cise of due care, see ante, 59.

Res ipsa loquitur.

68. Where a declaration in an action of tort for personal injuries by a passenger against a street railway company alleged generally that the injuries were caused by negligence of the defendant, and, in response to a motion for specifications of negligence, the plaintiff, after specifying some particulars, added, "And the plaintiff further says that he is unable to further specify as to the negligence of the defendant," if the evidence at the trial is such as to call for an application of the rule res ipsa loquitur, the plaintiff is not precluded from relying thereon although he has introduced no evidence to warrant a finding that the defendant was negligent in any of the particulars that he specified. McDonough v. Boston Elevated Railway, 436.

Unexplained falling of side bar of open electric street car was held under circumstances to be evidence of negligence on part of either conductor or motorman of car, see ante, 87.

Action against street railway company for injuries received by passenger, where plaintiff contended that he was shocked by electricity communicated to car upon which he was from passing car, and doctrine res ipsa loquitur was applied, see ante, 36, 68.

NEW TRIAL.

See Practice, Civil, 24-26.

NOTICE.

One who is invited or seeks to make contract with municipal corporation is chargeable with knowledge of extent of or lack of authority of corporation and its various officers to make such contract, see MUNICIPAL CORPORATIONS, 1.

- In order to maintain action against owner of building for personal injuries caused by ice, accumulated upon roof, falling upon plaintiff, notice required by St. 1908, c. 305, R. L. c. 51, §§ 20-22, must be given, see Nuisance, 2.
- No notice, of acceptance of certain contract for sale of merchandise which had been signed by guarantor before delivery to seller, was held to be necessary from seller to guarantors in order to bind guarantors, see Guaranty, 2.
- No notice, by seller to guarantors guaranteeing performance by purchaser of contract of purchase of bottles, of breach of contract by purchaser was held to be necessary under circumstances in order to cause guarantors to be liable on their contract of guaranty, see Guaranty, 5, 6.
- When notice to guarantor of breach of guaranteed contract is necessary to cause guarantor to be liable, see GUARANTY, 5.
- In order to show performance of provision as to reference to arbitrators in Massachusetts standard form of fire insurance policy, it is necessary to show, not only that arbitrators were appointed and met and agreed upon and signed award, but also that parties were notified thereof, see Insurance, 9.

NOVATION.

Under circumstances, release of holder of mortgage upon certain real estate insured for his benefit against loss by fire, and indorsement, by mortgagor, assented to by insurance company, directing payment in case of loss to new mortgagee, were held to furnish good consideration for undertaking of insurance company to indemnify new mortgagee, see Insurance, 10.

NUISANCE.

- 1. If the owner of a building on a city street, who retains control of the roof and of the outside of the building including the "water spout and eaves combined," suffers icicles to form on the conductor pipe, which carries away the water from the gutter of the roof, by reason of a leak in this pipe which is shown to have existed for more than two years, he can be found to be liable to a traveller on the public sidewalk adjoining the building who is injured by such an icicle falling upon him. Brewer v. Farnham, 448.
- 2. St. 1908, c. 305, declaring that the provisions of R. L. c. 51, §§ 20-22, "so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice," applies to an action for personal injuries caused by snow and ice which fell upon the plaintiff from the roof of the defendant's building where the defendant negligently had permitted it to accumulate, and there is no liability unless the required notice was given within ten days after the injury. Baird v. Baptist Society, 29.

Nuisance (centioued).

- Certain staircase in department store was held not to be nuisance, see Negligence, 62.
- Landlord held under circumstances not to be liable to guest of tenant for injuries caused by slip upon icy granolithic walk in court yard of landlord's building, see LANDLORD AND TENANT, 3.
- Town, which, exclusively for gratuitous amusement of public, undertakes celebration of fourth day of July under statutory authority, is not liable, as for maintenance of nuisance, for defect in public way, or in any other way, to one injured because of negligent way in which fireworks are discharged in such celebration, see Fireworks, 1-3.

OFFICER.

Duty of officer making attachment of personal property to ascertain as best he can whether property attached will exceed in value amount which he is ordered to attach; and when liability for excessive attachment arises, see Attachment, 1-3.

Person, who has been arrested without warrant for drunkenness and after he has recovered from intoxication has made statement in writing and request for release under provisions of St. 1905, c. 384, and has been released, cannot recover from officer who arrested him, or from person who assisted officer or from carrier of passengers whose agent person who assisted officer was, see False Imprisonment, 1; Waiver, 1; Joint Tortfeasors, 1; Carrier, 1.

PARTNERSHIP.

Holders of transferable certificates representing shares in personal property, held and managed by trustees without incorporation, are partners and are to be taxed as shareholders jointly under partnership name in place where business is carried on, and are not to be treated for purposes of taxation merely as cestuis que trust, to be assessed at places of individual residence, see TAX, 2.

Where chemist delivered to partnership certain secret formulas for them to manufacture and put upon market compounds made in accordance with formulas and to pay to him "fair and equitable share" of net profits, and partnership forms itself into corporation which takes over manufacture of formulas, partnership and corporation both are subject to trust under which formulas were delivered to partnership, see Equity Jurisdiction, 8.

PASSENGER.

Actions by passengers against elevated, street railway, and railroad companies for personal injuries, see Negligence, 24, 29-46.

PAYMENT.

An allegation that a payment was made in cash is supported by proof
that it was made by the setting off of mutual debts. Automatic Time
Table Advertising Co. v. Automatic Time Table Co. 252.

- The payment of certain notes to the holder of them, at the request of a
 person to whom a cash payment is due from the person making the payment, is a payment in cash to the person to whom the cash payment was
 due. Automatic Time Table Advertising Co. v. Automatic Time Table Co. 252.
- 3. The mere sending, by a debtor to a creditor, of a check on a bank for an amount which the debtor contended was the amount due, and the receipt of the check by the creditor do not render the check effectual as a payment.

 **Reliable Card & Novelty Co. v. Dolan, 53.
- 4. Evidence, that a debtor in Worcester sent to a creditor in New York a check on a bank for a sum which the debtor contended was the amount of the debt, the check having written upon it the words "In full" and a reference to the subject matter of the debt, that the creditor received the check and immediately sent it to an attorney in Worcester, who, without presenting it for payment, went to the bank upon which it was drawn, asked if there were funds there to meet it and was told that there were, and that the creditor, twenty-four days after the check was sent to him, caused an action to be brought against the debtor for what he contended was the amount of his claim against the debtor, will not warrant a finding that the creditor treated the check as payment of the debt. *Ibid*.

Action upon promissory note, where it was held jury were warranted in finding that defendants had maintained defense that note was paid by agreement between parties that services rendered by makers to payee should be accepted as such, see Bills and Notes, 1.

But where value of such services were held not to be proper subject of setoff, see Set-off, 1.

And it was held that, while collateral agreement, made when note was delivered, that such services should be accepted in payment, could have been relied on if it had been set out in answer, see BILLS AND NOTES, 2.

It could not be relied on when answer was merely general denial and payment, see Pleading, Civil, 1.

PERMIT.

Under what circumstances Legislature by statute can give to boards of public officers of cities or towns authority for granting of licenses or permits for bridging public streets, see Constitutional Law, 8.

PERPETUITIES, RULE AGAINST.

See DEVISE AND LEGACY, 11.

PERSONAL PROPERTY.

Whether certain portable furnaces had become part of real estate to which they were affixed, was held to be question of fact, see Fixtures, 1.

PLEADING, CIVIL.

Declaration and Specifications.

Specifications to declaration in action of tort against street railway company to recover for personal injuries alleged to have been caused by negligence VOL, 208.

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of defendant, which were held to allow plaintiff to rely on doctrine, resigns loquitur, although at trial he introduces no evidence to warrant finding in his favor as to any kind of negligence specified, see Negligence, 68.

Answer.

 In an action by the payee against the makers of a joint and several note, in which the answer contains only a general denial and an allegation of payment, the defendants cannot rely upon an independent collateral agreement that the payee would set off against the note the value of services to be rendered to him by the makers severally. McGuinness v. Kyle, 443.

Variance.

An allegation that a payment was made in cash is supported by proof
that it was made by the setting off of mutual debts. Automatic Time Table
Advertising Co. v. Automatic Time Table Co. 252.

POLICE.

Person, who has been arrested without a warrant for drunkenness and after he has recovered from intoxication has made statement in writing and request for release under provisions of St. 1905, c. 384, and has been released, cannot recover from officer who arrested him, or from person who assisted officer or from carrier of passengers whose agent person who assisted officer was, see False Imprisonment, 1; Waiver, 1; Joint Tortfeasors, 1; Carrier, 1.

POWER.

See DEVISE AND LEGACY, 9.

PRACTICE, CIVIL.

Premature Action; Tender.

Refusal to accept bank check tendered in payment of account and bringing of action for amount of account were held not to amount to rescission of contract, and return of check was not necessary condition precedent to bringing of action, see CONTRACT, 14.

Lis Pendens.

Plea in abatement in action of contract, alleging that another action was pending in which plaintiff was defendant and was setting up same claim in declaration in set-off, and proper action of court upon such plea, see post, 1-4.

Ad Damnum.

Where bill of exceptions states only that on day of entry of writ in court ad damnum of writ was increased "by agreement of counsel," yet, if statement of increase appears as one of docket entries in certified copy of record of court, it will be assumed that such amendment by agreement received approval of court, and surety bond to dissolve attachment previously given is not thereby released, see post, 5.

Abotement.

- Review by Knowlton, C. J., of decisions of this and of other courts with regard to what disposition should be made of pleas in abatement founded upon the pendency of another action for the same cause, where, before action upon the plea was called for, the previous action was disposed of. Manufacturers' Bottle Co. v. Taylor-Stites Glass Co. 598.
- 2. In an action of contract the pendency of another action for the same cause by the plaintiff against the defendant, in the form of a declaration in set-off filed by him in a previous action, is as good a reason for an answer in abatement as is the pendency of an original and independent suit for the same cause of action. Ibid.
- 8. It seems, that it is more equitable, where a second action is brought for a cause that was made the foundation of a former action which is defective in some essential particular, to allow the plaintiff to discontinue the former action upon proper terms and to proceed with the later one, rather than to order an abatement of the last action and to compel him to begin anew after the termination of the first. Ibid.
- 4. A defendant in an action filed a declaration in set-off, to which the plaintiff demurred. Later, and while the former action was pending, the defendant brought a separate action against the plaintiff for the same cause as that alleged in the declaration in set-off and in the second action the defendant filed a plea in abatement, based on the pendency of the claim in set-off. A determination of the plea was postponed until a determination of the issue raised by the demurrer to the declaration in set-off in the first action. That demurrer being sustained by this court on the ground that the claim alleged in the declaration in set-off was unliquidated, the plea in abatement in the second suit was overruled. Held, that the plea was overruled properly; although, it was intimated, that a better course to have adopted when action upon the plea in abatement first was asked for might have been to have ordered an abatement unless the declaration in set-off was abandoned, that is, to have compelled an election between the two actions. Ibid.

Abatement of writ of entry by surrender of possession of premises by tenant and taking of possession by demandant, see WRIT OF ENTRY, 1.

Parties.

Proper parties to action upon benefit certificate of fraternal beneficiary corporation of this Commonwealth or of another State, see FRATERNAL BENEFICIARY CORPORATION, 1.

Amendment of Writ.

5. Where in a bill of exceptions it is stated that on the day a writ was entered in a municipal court the ad damnum of the writ was increased to an

Practice, Civil [continued].

amount named "by agreement of counsel," yet, if a statement of the increase of the ad damnum appears as one of the docket entries in a certified copy of the record of the court in which the case was pending, it will be assumed that the amendment by agreement of counsel received the approval of the court. McNeilly v. Driscoll, 293.

And such amendment, made after giving of bond to dissolve attachment, does not release surety on bond, see Surety, 1.

Election of Remedy.

6. In an action to recover \$120 as the price or compensation for a series of six pencil drawings to be used as illustrations in a book to be published by the defendant, it appeared that there was an entire contract for the six drawings for the round price named, that when the plaintiff had completed five drawings and had done a part of the sixth, he showed them to the defendant who expressed dissatisfaction and said "that he would not accept the drawings as they were," that the plaintiff proceeded to finish the sixth drawing and then brought an action, previous to the present one, for the contract price, that in that action a judge, who heard the case without a jury, found for the defendant and a general judgment for the defendant was entered, that thereafter the plaintiff brought the present action in which he sought to recover damages on the ground that the defendant had repudiated the contract by ordering the plaintiff to cease work before the sixth drawing was completed and that this gave the plaintiff the right to receind the contract and recover on a quantum meruit the value of his services. Held, that the plaintiff by bringing his first action had made a conclusive election of remedy by affirming the contract and suing on it for the contract price, and that, having failed to prove performance, it was too late for him to take the ground that complete performance on his part was not necessary because the defendant's repudiation of the contract had given the plaintiff the right to rescind it and recover for the value of his services. Whether on other pleadings the plaintiff could have recovered damages for the defendant's alleged repudiation of the contract was not considered. Hunt v. Updike, 466.

Variance.

Allegation that payment was made in cash is supported by proof that it was made by setting off of mutual debts, see PAYMENT, 1.

Rules of Court.

Rule 6 of Supreme Judicial Court for the Commonwealth will not permit amendment to petition to establish exceptions by addition of allegations not supported by affidavit made within twenty days after notice of refusal to allow bill, see post, 29.

Agreed Statement of Facts.

What question is open upon appeal from findings of judge before whom, without jury, case is heard upon agreed statement of facts giving judge power to draw inferences from facts stated, see post, 10, 11.

Auditor's Report.

- 7. R. L. c. 165, \$ 55, makes an auditor's report prima facis evidence, but this leaves the party against whom his finding was made full opportunity to introduce at the trial evidence to disprove the correctness of such finding and also to raise any question of law on which he thinks that the ruling of the auditor was wrong. White v. Hale, 94.
- 8. The denial of a motion, to recommit an auditor's report with instructions to the auditor to set out in his report the facts and evidence on which he based his findings and rulings contrary to those requested by the party presenting the motion, is wholly within the discretion of the judge to whom the motion is addressed, and is not subject to exception or open to revision upon appeal. *Ibid*.
- 9. When at a trial a report of an auditor is introduced in evidence and contains rulings upon mixed questions of law and fact such that the rulings of law cannot be distinguished from the findings of fact, it is proper for the judge in his charge to give to the jury the correct rules of law on the subjects dealt with in the report and to instruct them to disregard that part of the report which states the law differently. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.

Duty of Judge as to Ruling not raised by Pleadings or asked for by Parties.

See post, 17.

Findings by Trial Judge.

- 10. Where a judge, who, without a jury, hears an action of contract, finds for the plaintiff, and the defendant alleges exceptions, such finding is to stand if it is warranted in law upon any possible view of the evidence. Valey v. Bigelow, 89.
- 11. On an appeal from a judgment entered by order of a judge to whom the case was submitted, without a jury, upon an agreed statement of facts with power to draw inferences from the facts stated, the question before this court is whether, upon the facts stated and any inferences which the trial judge was warranted in drawing therefrom, his findings were warranted. Timberlake v. Order of the Golden Cross, 411.

Disagreement of Counsel.

Judge presiding at trial, in case counsel disagree as to how certain witness testified, may instruct jury that question is for them to decide, see post, 19.

Papers produced on Call of Adverse Party.

See EVIDENCE, 17.

Conduct of Trial.

Cumulative evidence.

12. It is wholly within the discretion of a presiding judge to determine whether cumulative evidence shall be received upon a point which has been admitted by the adverse party. Brown v. Brown, 290.

Practice, Civil (continued).

Discretionary determination of remoteness of evidence.

Proper exercise of discretion of judge in deciding that observations as to conditions of temperature, cloudiness and snow fall at point some distance from place where personal injuries were received by plaintiff in action against street railway company were admissible in evidence, where such conditions at place of injury are material, see EVIDENCE, 5.

Direct, cross and redirect examination of witnesses.

- 18. Upon the cross-examination of the plaintiff in an action against a corporation for personal injuries, as in other cases, it is within the discretion of the presiding judge to determine how far he will permit the same questions to be repeated in the same or different forms or whether he will allow or will refuse to allow the previous questions and answers of the witness to be read over by the stenographer, and generally it is within his discretion to restrict within reasonable limits the length and extent of the cross-examination. Smith v. Boston Elevated Railway, 186.
- Proper refusal by presiding judge to allow witness in redirect examination to explain unambiguous statement made in direct examination, see WITNESS, 2.
- Where party calls adverse party as witness and proceeds to cross-examine him as permitted by R. L. c. 175, \$ 22, regulation and scope of cross-examination and order of evidence are subject to discretion of judge, and evidence may afterward be introduced by examining party to contradict testimony thus elicited, see WITNESS, 1; EVIDENCE, 18.

Requests and rulings.

- 14. A judge presiding at a trial is not bound at the request of one of the parties to single out any part of the case for comment in his charge to the jury. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.
- 15. No exception lies to the refusal of the judge presiding at a trial to give a ruling which assumes as true facts which are in dispute. *Ibid*.
- 16. A presiding judge properly may refuse to rule upon certain uncontroverted facts picked out from the evidence when the disputed facts also are material. O'Brien v. Shea, 528.
- Application of foregoing principle, see LANDLORD AND TENANT, 5.
- 17. At the trial of an action of contract, if the evidence discloses the fact that the agreement relied upon by the plaintiff was made on a Sunday, contrary to the prohibition contained in R. L. c. 98, § 2, St. 1904, c. 460, § 2, but this defense does not appear from the allegations of the declaration and is not set up in the answer and the defendant in no way raises the question at the trial, although it seems that the presiding judge, if he sees fit to do so, may of his own motion rule upon the question in favor of the defendant, and that such ruling would be sustained, yet it is not the absolute duty of the judge to interfere by proposing and sustaining this defense which has not been set up by the defendant, and his failure to do so gives the defendant no ground for exception. O'Brien v. Shea, 528.

- 18. At the trial of an action to recover the amount of certain life insurance and also to recover certain premiums for such insurance paid in advance, which never became payable because the insured died before the dates when they were to become due, the declaration contained four counts, two upon the policy and two for the premiums prematurely paid. The plaintiff introduced evidence that the policy sued on was lost or destroyed and testimony in regard to statements of the insured and other oral evidence as to the contract of insurance contained in the lost policy. The defendant introduced an instrument which its witnesses testified was a true copy of the policy, but this was denied by the plaintiff. The defendant asked the presiding judge to rule that, "if the contract between the insured and the defendant was a policy like the one put in evidence by the defendant then the plaintiff is not entitled to recover." The judge refused to make this ruling. Held, that the judge was justified in considering the ruling requested as intended to apply to the whole declaration, that being its natural interpretation, and so interpreted it clearly could not have been given in regard to the counts for the premiums prematurely paid, so that the refusal of the judge was right, whether or not the plaintiff had complied with the terms set forth in the copy of a policy which had been put in evidence by the defendant. Monjeau v. Metropolitan Life Ins. Co. 1.
- Exception to refusal to grant request for ruling which was rendered immaterial by special finding of jury, see post, 46.
- Request for ruling at trial of action for damages due to lot of mackerel sold by defendant to plaintiff not being of grade alleged to have been purchased, which was held rightly to have been refused because not applicable to case, see SALE, 11.
- New trial on question of damages only was ordered upon sustaining of defendant's exception to erroneous instruction of judge upon matter of damages, see post, 25.
- Requests, by defendant in action against insurance company upon policy of insurance, for rulings that plaintiff had not made to defendant proper proof of death of insured and was not entitled to recover, were held rightly to have been refused because questions, whether contract of insurance had been performed and whether proper proof of death had been made, were for jury, see Insurance, 4, 6.
- In action against insurance company upon policy of life insurance which was lost, where defendant introduced in evidence what it contended was insured's original application for insurance and copy of policy which it contended was issued to insured and had attached to it copy of such application, and plaintiff's evidence tended to controvert that of defendant both as to there having been any copy of application attached to policy and as to accuracy of alleged copy of policy, presiding judge may refuse requests for rulings based on statements in application and on assumption that copy of application was attached to policy, because question whether copy of application was attached to policy was for jury, see Insurance, 5.

Burden of proving that all representations made by insured in application for life insurance were true is not upon plaintiff in action upon policy in

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this Commonwealth, and request for rulings based upon such proposition of law properly was refused, see IMSURANCE, 1.

Judge's charge.

- 19. In an action of tort for personal injuries, where there is a difference in the contentions of the respective counsel as to what a certain witness said, it is right for the presiding judge to instruct the jury that they must determine for themselves what the testimony was. Smith v. Boston Elevated Railway, 186.
- 20. A charge of the judge presiding at a trial, which was objected to as argumentative, here was held not to be in violation of R. L. c. 173, § 80, under the rule laid down in Whitney v. Wellesley & Boston Street Railway, 197 Mass. 495. Stewart v. Fuller, 359.
- 21. In an action of contract for the price of coal sold and delivered, the plaintiff in testifying referred to his day book, which was not put in evidence, and explained that it was his practice when an order was given to write it out on a piece of paper, which was kept until the order was filled by the delivery of the coal, and that then the order and the method of filling it were entered on the day book and the slip was thrown away. The plaintiff used the day book to refresh his recollection both on his direct examination and on his cross-examination. The defendant denied that the coal was ordered or was delivered. The judge in the course of his charge said to the jury, "There are on the one hand the books, a record made of a sale, and on the other hand the memory of a man." The defendant excepted to this on the ground that the judge assumed that there was a record in evidence, the account book of the plaintiff. Held, that this exception could not be sustained, because the presiding judge in referring to the plaintiff's account book did not say or assume that it was in evidence. Ibid.
- 22. In an action of tort for personal injuries, where the judge in his instructions to the jury makes a remark tending to disparage the testimony of the plaintiff and his witnesses in regard to the effect of the alleged injuries upon the plaintiff's physical condition, and, upon objection and exception by the plaintiff's counsel, tells the jury that on account of such objection he withdraws the remark, and the jury return a verdict for the defendant, the plaintiff has no ground for exception, the remark, even if it had not been withdrawn, relating only to the question of damages and having been made immaterial by the verdict for the defendant on the question of liability. Todd v. Boston Elevated Railway, 505.

Proper charge of judge with regard to effect as evidence of auditor's report, see ante, 9.

Exception to portion of charge which was not sustained because objection was to few lines only of portion excepted to and those lines were susceptible to construction which was not objectionable, see post, 41.

Portions of charge of judge to jury in action upon contract which arose when offer in writing of plaintiff to sell real estate was accepted orally by defendant and plaintiff afterward ineffectually attempted to modify contract, which were held to contain correct statements of law regarding such

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attempt and regarding construction and performance and breach of contract, see CONTRACT, 5, 12.

Verdict.

Action of judge, who presided at trial of action against street railway company for personal injuries alleged to have been received by plaintiff as she was alighting from car, in setting aside verdict, was held to have been proper exercise of discretion, see post, 26.

Ordering Verdict.

- 28. Where at the trial of an action of contract a special finding of the jury has established the facts alleged by the plaintiff, which make the defendant liable, and the amount of damages is not in dispute, it is proper for the presiding judge to order a verdict for the plaintiff under instructions which fix its amount. Manning v. Anthony, 399.
- 24. If at a trial there is some evidence, which, if believed, would warrant a verdict for the plaintiff, the case should be submitted to the jury although the weight of the evidence is so strongly against the plaintiff as not to justify a verdict in his favor, and, if the jury, notwithstanding the nature of the evidence, return a verdict for the plaintiff, the injustice of the finding may be corrected by the presiding judge setting aside the verdict. Niland v. Boston Elevated Railway, 476.
- Verdict was wrongly ordered for defendant in action against railroad corporation under St. 1906, c. 468, Part II. § 245, for death of one killed at grade crossing of highway with railroad, where defendant was required to prove affirmatively that when killed decedent was guilty of gross or wilful negligence, see RAILBOAD, 8, 5.
- Where plaintiff is only witness in his own behalf, and testimony given by him in direct examination would entitle him to have case go to jury, fact that in cross-examination he makes conflicting statements does not deprive him of that right, such conflict being matter for jury to weigh, see EVIDENCE, 3.
- Refusal, by judge presiding at trial of action for price of goods sold, to order verdict for defendant where only question was, whether price was payable in money or in goods, and evidence was conflicting, was held to be correct, see SALE, 12.
- Verdict was properly ordered in action for rent under lease where execution and delivery of lease were admitted and no just ground for refusal to pay rent appeared, see LANDLORD AND TENANT, 4.

New Trial.

25. In an action of tort for personal injuries, where, after a verdict for the plaintiff, an exception of the defendant was sustained on account of an erroneous instruction by the presiding judge upon the matter of damages, a new trial was ordered on the question of damages only. Pullen v. Boston Elevated Railway, 356.

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26. It is the right and duty of a judge presiding at the trial of a civil case to set aside the verdict of the jury when in his judgment it is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence but was the product of bias, misapprehension or prejudice, and the exercise of such discretion by the judge who presided at the trial of an action of tort by a woman against a street railway company for injuries, received while the plaintiff was alighting from a car of the defendant and alleged to have been caused by an unwarranted starting of the car, where the plaintiff was the only witness as to the happening of the accident and her story seemed to the judge so improbable and absurd that it could not command the credence of any right minded men, cannot be revised by this court. Scannell v. Boston Elevated Railway, 518.

Verdict should not be ordered for defendant if there is some evidence which, if believed, would warrant verdict for plaintiff although judge might set aside verdict because of character of evidence if verdict were returned for plaintiff, see ante, 24.

Appeal.

Supreme Judicial Court may grant leave to parties to exhibit further evidence, under R. L. c. 159, § 24, only in cases before it upon appeal and not in cases before it upon exceptions, see post, 47.

What question is open upon appeal from findings of judge before whom, without jury, case is heard upon agreed statement of facts giving judge power to draw inferences from facts stated, see ante, 11.

Denial of motion to recommit auditor's report is not subject to exception or open to revision on appeal, see ante, 8.

Report.

27. A stipulation in the report of a case reported by a judge of the Superior Court for determination by this court, that such order may be entered "as the court deems just," means that such an order shall be entered as this court find to be required by law. McIlroy v. McIlroy, 458.

Exceptions.

Establishment of exceptions by proceedings before full court.

- Proceedings to establish the truth of exceptions are treated as strictissimi juris. Bishop, petitioner, 405.
- 29. A petition to establish the truth of exceptions cannot be amended by adding to it allegations which are not supported by an affidavit made within twenty days after notice of the refusal to allow the bill of exceptions, as required by Rule 6 of the rules for the regulation of practice before this court. *Ibid*.
- 30. If upon the face of a petition to establish the truth of exceptions it appears that the exceptions sought to be proved are plainly frivolous and immaterial, the petition should be dismissed without an inquiry into the

truth of its allegations; but it is only when the immateriality is obvious that the petition can be dismissed on this ground. Where the petitioner presents questions proper for argument and for deliberate consideration by this court, they will not be disposed of without giving the petitioner an opportunity to establish the truth of the exceptions which he has alleged and to argue them if they are established. Bishop petitioner, 405.

- 31. Where upon the face of a petition to establish the truth of exceptions it appeared that the petitioner's requests for rulings raised only questions of fact upon which the petitioner had the burden of proof, and that the evidence on these questions was conflicting, and that the only other exception alleged to which the petition related was to the admission in evidence of a certain sentence in a letter, written by a man who had testified as a witness for the petitioner, and whose testimony the sentence in the letter tended plainly to contradict in a material matter, it was held, that the petition should be dismissed on the ground that, if the exceptions alleged by the petitioner were established, they would present no questions of law of sufficient gravity to call for consideration by this court. Ibid.
- 82. Under R. L. c. 178, § 110, a petition to this court to establish the truth of exceptions can be maintained only when the excepting party is aggrieved, and the grievance which the petition states must be a mistake of law or fact on the part of the judge or a neglect or failure to do his judicial duty properly. If the conduct of the judge was justifiable there is no grievance. *Mechan, petitioner*, 60.
- 83. Upon a petition to prove a bill of exceptions it appeared that a period of more than five years elapsed between the filing of the bill of exceptions and the death of the judge who made the ruling in question, that a further period of nearly three years intervened between the death of that judge and a formal presentation of the bill of exceptions to the judge who disallowed it more than eight years after the exception was taken, that the disallowance was because the judge was unable to find that it was conformable to the truth, and that in fact it was not conformable to the truth legally and technically and could not have been allowed properly without amendment. It further appeared that the judge who disallowed the exceptions had no knowledge of the case except from what appeared in the papers before him, which did not include a statement of all the evidence, and that the counsel for the defendant, in whose favor the ruling in question was made, had ceased to represent the defendant. Held, that, in dealing with the difficulties, which grew out of the failure of the excepting party to proceed with reasonable diligence to have his exceptions allowed, the judge was not called upon to institute measures of an extraordinary and unusual kind to find out what occurred at the trial and to give to the questions arising on the presentation of the bill of exceptions an amount of time and labor that reasonably could not be spared from the other pressing duties of his office, and consequently that it did not appear that the petitioner had been aggrieved by the action of the judge. Ibid.
- 84. When an excepting party fails to proceed with reasonable diligence to have his exceptions passed upon until it has become impracticable to

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establish the truth of a bill of exceptions to the reasonable satisfaction of the judge to whom it is presented for allowance, such excepting party must suffer the consequences of his delay. *Mechan petitioner*, 60.

Insufficient bill.

85. In refusing to entertain an exception to the denial of a motion to recommit an auditor's report, this court called attention to the fact, that here, as in *Tobin* v. *Kells*, 207 Mass. 804, even if the court had had authority to review the exercise of discretion by the trial judge, there was nothing in the record to show what facts, if any, were agreed upon or proved at the hearing of the motion which was denied. White v. Hale, 94.

Construction, scope and effect of bill of exceptions.

- 86. It is at least doubtful whether this court have power under R. L. c. 156, § 8, where an action at law is before them upon a bill of exceptions, to order a new trial on account of an error of law made by the judge who presided at the trial which is not brought in question by any of the exceptions. By Sheldon, J. O'Brien v. Shea, 528.
- 87. Where an action at law is before this court upon a bill of exceptions, only the questions raised by the exceptions can be considered. In the present case the question sought to be raised before this court was not brought to the attention of the presiding judge at the trial, was not raised or referred to by counsel at the trial and was not open on the pleadings. *Ibid*.
- 38. Where, in an action for personal injuries by reason of the alleged defective condition of the defendant's premises caused by snow and ice, there was no averment or proof that the plaintiff had given notice to the defendant of the time, place and cause of the injury within ten days as required by St. 1908, c. 305, but this conclusive defense appeared not to have been brought to the attention of the judge presiding at the trial, who had refused to order a verdict for the defendant, the case here was considered on other grounds, on which the defendant's exceptions were sustained. O'Donoughue v. Moors, 478.
- 89. Where at the trial before a judge without a jury of an action for \$3,488, a balance alleged to be due upon a note secured by a mortgage upon real estate after a sale in foreclosure of the mortgage, the defendant merely asks the judge to rule that as matter of law the plaintiff cannot recover, and, the ruling being refused and the judge finding for the plaintiff, alleges an exception merely to the refusal to give the ruling, no question as to whether an amount of \$1,262, which was paid by the plaintiff as taxes upon the mortgaged property before foreclosure, properly was included in the finding, is brought before this court. Valey v. Bigelow, 89.
- 40. Where the presiding judge at a trial excludes certain evidence, stating that it is excluded as being cumulative evidence in regard to a matter admitted by the adverse party and on which the judge has found in favor of the party offering the evidence, if the party offering the evidence excepts to the exclusion generally, without suggesting any other ground on which the evidence should be admitted, his exception will be taken to

be to the exclusion of the evidence upon the ground stated by the judge, and he will not be allowed to argue that the exclusion was wrong because the testimony offered was admissible for a different purpose. In the present case it appeared that the different ground on which the evidence was said to be admissible was not applicable. Brown v. Brown, 290.

- 41. Where at a trial an exception was taken to about ten lines of the judge's charge and in this court the excepting party objected to only two of the ten lines, which appeared to be somewhat obscure although susceptible to a construction that made the instruction correct, and it did not appear in the bill of exceptions that the trial judge's attention was called at the close of the charge to the objection to the specific two lines, the exception cannot be sustained. Bartow v. Parsons Pulp & Paper Co. 232.
- 42. If at a trial letters are admitted in evidence each of which contains matters material to the issues raised by the pleading, but some of which also contain other matters which do not relate to such issues, and if the party against whose general objection the evidence is admitted does not ask to have the irrelevant parts stricken out or to have the effect of the letters restricted to certain issues, his general exception to the admission of the letters will not be sustained. Everson v. Casualty Co. of America, 214.

Construction of certain statements in bill of exceptions, see SALE, 5.

Denial of motion to recommit auditor's report is not subject to exception or open to revision on appeal, see ante, 8.

No exception lies to refusal of judge to give ruling which assumes as true facts which are in dispute, see ante, 15.

Exceptions to findings of judge who heard case without jury will not be sustained if findings were warranted upon any possible view of the evidence, see ante, 10.

Application of foregoing, see MORTGAGE, 2.

Assumption of proper preliminary action by trial judge.

43. Upon an exception to the admission in evidence of a statement of a deceased person under R. L. c. 175, § 66, it must be assumed, unless the contrary is shown by the record, that the trial judge made all the findings necessary under that statute. Newton Centre Trust Co. v. Stuart, 221.

Where bill of exceptions states only that on day of entry of writ in court ad damnum of writ was increased "by agreement of counsel," yet, if statement of increase appears as one of docket entries in certified copy of record of court, it will be assumed that such amendment by agreement received approval of court, see ante, 5.

Action of court not prejudicial to excepting party.

44. At the trial of an action for personal injuries alleged to have been caused by the defendant's negligence, where there is no evidence of negligence on the part of the defendant, the exclusion of evidence, which, if admissible at all, had a bearing only upon the due care of the plaintiff, does not injure the plaintiff and gives him no ground for exception. Chick v. Gilchrist Co. 183.

- 45. If at a trial certain letters are admitted in evidence against the objection and exception of one of the parties, and afterwards the judge instructs the jury to find in favor of the excepting party upon all the questions to which the letters relate, this makes the admission of the letters wholly immaterial, as it cannot possibly have harmed the excepting party. Everson v. Casualty Co. of America, 214.
- 46. Where, at the trial of an action for the alleged breach of a contract to purchase certain land, there was evidence warranting a finding that an offer in writing by the defendant to purchase the land was accepted orally by the plaintiff, a special finding by the jury that such offer was so accepted renders immaterial an exception by the defendant to a refusal by the presiding judge to rule that, if there was no unequivocal oral acceptance of the offer, a formal agreement, offered later by the plaintiff to the defendant for his signature and containing terms varying from the defendant's original offer in writing, was a counter proposition which put an end to the offer. Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co. 121.

Exception to remarks of judge in charge relating to question of damages, which became immaterial because verdict was for defendant, see ante, 22.

In action for price of goods sold, where only question is, whether price was to be paid in money or in other goods of defendant, and judge instructs jury that, if it was to be paid in other goods of defendant, plaintiff could not recover, defendant is not harmed by exclusion of evidence as to prices for which he was selling his own goods, see SALE, 14.

No new evidence at hearing on exceptions.

47. The provision of R. L. c. 159, § 24, under which in cases of accident or mistake the full court may grant leave to parties to exhibit further evidence, applies only to cases that come to this court by appeal and is not applicable to a case which comes before the court upon a bill of exceptions. Foss v. Atkins, 510.

Arrest of Judgment.

- 48. Review by BRALEY, J., of the decisions of this court under the common law and under St. 1852, c. 312, § 22, now R. L. c. 178, § 118, with regard to motions in arrest of judgment. *McManus* v. *Thing*, 55.
- 49. At the trial of an action of tort, certain specific questions were submitted to the jury and were answered by them and, in accordance with instructions by the presiding judge, they found generally for the defendant. Thereafter and before the jury were discharged the foreman of the jury, in reply to an oral question by the judge on a material question, gave an answer which was inconsistent with the answers in writing already recorded. The plaintiff moved that certain of the answers in writing be set aside as inconsistent with the oral answer, and the defendant moved that the oral answer be set aside. The plaintiff's motions were denied and the defendant's motion was granted, and exceptions by the plaintiff were overruled by this court, who stated that "there was no inconsistency in the answers that were allowed to stand or between them and the ver-

dict." Thereafter the plaintiff moved that the judgment be arrested because it appeared by the record that a material issue of fact, the one which was the subject of the oral question by the judge to the jury, was not settled or decided. The judge denied the motion. Held, that, the record showing no inconsistency between the special findings which had been allowed to stand and the general verdict, the defendant was entitled to judgment and the plaintiff's motion was denied properly. McManus v. Thing, 55.

Set-off.

See SET-OFF, 1.

Costs.

Attorney at law is not owner of costs taxed to client, see ATTORNEY AT LAW, 2, 8.

Writ of Entry.

Abatement of writ of entry by surrender of possession of premises by tenant and taking of possession by demandant, see WRIT OF ENTRY, 1.

PRACTICE, CRIMINAL.

Venue.

Order of judge of Superior Court in denying motions for change of venue in criminal case, which was interpreted as refusal of court to act at all on motions and to give basis for remedy of mandamus, see Mandamus, 1.

Superior Court has power to change place of trial of person charged with felony, when satisfied that fair and impartial trial cannot be had in county where venue is laid in indictment; but power should be exercised with great caution, see post, 1, 3.

Proceedings in such case, see post, 2.

Change of Place of Trial.

- It is within the jurisdiction of the Superior Court to order a change of the place of trial of a person charged with a felony from one county to another, when satisfied that a fair and impartial trial cannot be had within the county where the venue is laid in the indictment. Crocker v. Justices of the Superior Court, 162.
- 2. When it is plainly shown that an impartial trial of a person indicted for a crime cannot be had in the county where the venue is laid in the indictment, a record should be made of that fact, and an order should be made transferring the case for trial to another county at a regular sitting of the court there; but the indictment remains unaltered as to venue, and all proceedings upon the indictment except the trial by jury should be in the county where the indictment was found. Ibid.
- The power of the Superior Court to order a change of the place of trial in a criminal case from one county to another is one which should be exer-

cised with great caution and only after a solid foundation of fact has been established showing that the ends of justice require such a change. Crocker v. Justices of the Superior Court, 162.

Order of judge of Superior Court in denying motions for change of venue in criminal case, which was interpreted as refusal of court to act at all on motions and to give basis for remedy of mandamus, see MANDAMUS, 1.

Challenging of Jurors.

4. Under R. L. c. 176, § 29, which is the only statute on the subject, there is nothing requiring the Commonwealth in a criminal case to exercise its right of challenging jurors before the defendant or to prevent the Commonwealth from challenging jurors peremptorily after the defendant has exhausted all his challenges. In the absence of a direction by the court defining the order and manner of making the challenges, the right to challenge continues on both sides until the jurors are sworn. Commonwealth v. White, 202.

PROBATE COURT.

Jurisdiction.

- 1. R. L. c. 137, § 4, is as follows: "If administration has not been taken on the estate of a testator or intestate within twenty years after his decease, and any property or claim or right thereto remains undistributed or thereafter accrues to such estate and remains to be administrated, original administration may for cause be granted, but such administration shall affect no other property." Held, that under this statute property of an intestate which "remains undistributed" is property which actually has not been distributed among the persons entitled to it as next of kin, and includes a dividend from the receiver of a savings bank, in which the intestate had a deposit, which has been paid to the treasurer of the Commonwealth as due on the deposit of the intestate nearly thirty years after the death of the intestate, when no administration of his estate ever has been applied for or issued; and in such a case administration may be granted under the statute quoted above. Dallinger v. Morse, 501.
- 2. Where the Probate Court has power to appoint an administrator and makes such an appointment, but the person appointed resigns without performing his duties although there is property of the estate of his intestate to be administered, it necessarially follows that the Probate Court has jurisdiction to appoint an administrator de bonis non. Ibid.
- Power of Probate Court upon petition under R. L. c. 158, § 35, and c. 152, § 31, to enforce previous order that husband should pay certain sum monthly to wife for her support, see HUSBAND AND WIFE, 8.

Appeal.

Power of Superior Court upon appeal from order of Probate Court upon petition under R. L. c. 152, § 81, to enforce previous order of Probate Court that husband should pay certain sum monthly to wife for her support, see Husband and Wife, 4.

Decree.

Effect upon order of Probate Court under R. L. c. 153, § 38, directing husband to pay certain sum of money monthly to wife for her support, of resumption by parties of cohabitation, and of death of husband, see Husband and Wife, 1, 2.

Procedure.

The strict rules of common law pleading usually are not applied to proceedings in the Probate_Court. Dallinger v. Morse, 501.

RAILROAD.

Liability for Injury or Death at Grade Crossings.

- The statutes requiring signals to be given by locomotive engines approaching crossings at grade of railroads with public ways are intended only for the protection of persons who rightfully are upon the public ways. Chase v. New York Central & Hudson River Railroad, 187.
- 2. In an action by an administrator against a railroad corporation under St. 1906, c. 468, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by the neglect of the defendant to give the signals required by § 147 of the same chapter, if it appears that the signals were not given and that the failure to give them contributed to the happening of the accident, the plaintiff is entitled to recover, unless the defendant sustains the burden of showing that the intestate, in addition to a mere want of ordinary care, was guilty of gross or wilful negligence or a violation of law which contributed to the injury. La Fond v. Boston & Maine Railroad, 451.
- 8. It is seldom that a presiding judge can rule as matter of law that a material fact has been proved affirmatively, and, in an action by an administrator against a railroad corporation under St. 1906, c. 463, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by the neglect of the defendant to give the signals required by § 147 of the same chapter, facts on which the jury could find that the intestate was guilty of gross negligence do not for that reason justify the presiding judge in ruling that the defendant as matter of law has proved gross negligence of the intestate. *Ibid*.
- 4. In an action against a railroad corporation under St. 1906, c. 463, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by neglect of the defendant to give the signals required by § 147 of the same chapter, if it appears that the intestate had alighted from a local train of the defendant at a station of the defendant, near which he lived, and that he proceeded to cross the parallel tracks at the station on his way home, when he was struck and killed by an inbound express train on the third track, and the defendant contends that the plaintiff cannot recover because it is shown that his intestate was guilty of gross negligence, evidence, that there was an established practice of the defendant, of which the intestate from his long familiarity with the locality might have

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- been found to have had knowledge, that no express train should go past the station while a local train was discharging passengers there, is admissible as tending to show the absence of gross negligence on the part of the intestate. La Fond v. Boston & Maine Railroad, 451.
- 5. In an action by an administrator against a railroad corporation under St. 1906, c. 468, Part II. § 245, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, caused by neglect of the defendant to give the signals required by § 147 of the same chapter, there was evidence that the signals were not given and that the failure to give them contributed to the happening of the accident. It appeared that the intestate, who was a little deaf, had alighted from a local train of the defendant at a station of the defendant, near which he lived, and that, passing behind the train from which he had alighted, he proceeded to cross the parallel tracks at the crossing on his way home, walking in the line of the sidewalk which was intercepted by the crossing, when he was struck and killed by an inbound express train on the third track. The gates were down, but the intestate was inside of them and it was not shown that he was aware of their position. There was evidence that, if he did know it, he had reason to suppose that the gates were kept closed merely because the rear of the train from which he had alighted extended over a part of the plank walk in the line of the sidewalk. There also was evidence on which the jury could have found, that there was an established practice of the defendant not to have an express train go past the station while a local train was discharging passengers, and that the intestate from his familiarity with the locality knew of this practice. It also could have been found that before stepping on the track the intestate had passed a gateman, who was just outside the gates, and had received no warning or intimation of danger. It did not appear that the intestate then saw the express train approaching. It appeared that when the intestate was about to step on the track of the express train his attention was attracted by shouts from the gateman and the bystanders, that he then turned around and started back, but became confused, turned again and walked toward the express train and was struck and killed. It might have been found that, but for his pausing and turning around and his bewilderment and confusion caused by the shouts, the intestate would have crossed in safety. Held, that it could not be ruled as matter of law that the defendant had shown that the plaintiff's intestate was guilty of gross negligence, and that the case was for the jury. Ibid.

Common Law Liability for causing Fire.

Action against railroad company to enforce common law liability for causing fire which burned cottage of plaintiff in Rhode Island, see Negligence, 64, 65.

Common Law Liability for Negligence.

Actions against railroad corporation for personal injuries and death of employees, see NEGLIGENCE, 48-46.

Action raising question of liability of railroad company for injuries received by teamster in employ of dealer in hay, who was sent by employer to get hay stored in freight house of company and was alleged to have been injured because of negligent piling of hay, see Negligence, 46.

Disposition of Real Estate no longer Available for Purposes of Incorporation.

- 6. When a railroad corporation finds itself the owner of a large tract of valuable land in the heart of a city, which no longer is available for railroad purposes, it is the duty of such corporation to dispose of the land and turn it into money, and the corporation lawfully may exercise such powers as are incidental to its ownership and right to sell, but nothing more is permissible than what is fairly incidental to a disposition of the property for its fair market value within a reasonable time. Williams v. Johnson, 544.
- 7. A railroad corporation, subject to the laws of this Commonwealth and operating a railroad therein, which was the owner of a large tract of land in the heart of a city of the estimated value of \$5,000,000 that no longer was available for railroad purposes, made a deed of conveyance of such tract of land to certain trustees accompanied by a declaration of trust, by which the property was put into the hands of the trustees as managing agents, who were appointed irrevocably, to conduct a business relating to the improvement, sale and management of real estate for a term that might last nearly a century, with practically the powers of an absolute owner not only over the property conveyed but for the acquisition and management of other real estate in the vicinity and of shares in corporations relating to the use, management and improvement of real estate. The scheme set forth in the declaration of trust contemplated the borrowing of money to create an indebtedness not exceeding \$4,000,000 at any one time. The railroad corporation was to receive from the trustees in payment for the conveyance transferable certificates representing fifty-two thousand shares of the beneficial interest of the property held in trust of the par value of \$100 each. The trustees were authorized to issue not exceeding forty thousand additional shares of the same nominal value in exchange for convertible notes or bonds that the trustees might issue to obtain money to be used in conducting the enterprise, and the declaration of trust contemplated an unlimited extension and enlargement of the enterprise, in the discretion of the trustees, by the issuing of additional shares to persons who should subscribe for them. Held, that the deed of the railroad corporation was beyond the power of the corporation to make and that the trustees took no valid title under it. Ibid.

REAL ESTATE.

Whether certain portable furnaces had become part of the real estate to which they were affixed was held to be question of fact, see FIXTURES, 1.

REAL ESTATE TRUST.

Holders of transferable certificates representing shares of personal property, held and managed by trustee without incorporation, are partners and are to be taxed as shareholders jointly under partnership name in place where business is carried on, and are not to be treated for purposes of taxation merely as cestuis que trust, to be assessed at places of individual residence, see Tax, 2.

REFEREE.

In order to show performance of provision as to reference to arbitrators in Massachusetts standard form of fire insurance policy, it is necessary to show, not only that arbitrators were appointed and met and agreed upon and signed award, but also that parties were notified thereof, see Insurance, 9.

RELEASE.

Release by borrower of rights under small loans act, R. L. c. 102, § 51, is effectual, see SMALL LOANS ACT, 2, 3.

Action of tort for damages resulting from plaintiff's relying on false and fraudulent representations by defendants that corporation, of which they were officers and agents, was engaged in legitimate stock brokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents or servants," see False Representations, 1.

RES IPSA LOQUITUR. See Negligence, 86, 87, 68.

RES JUDICATA.

1. In a suit in equity in another State, seeking to annul as ultra vires a consolidation between a fraternal beneficiary corporation in such other State and a Massachusetts fraternal beneficiary corporation, in which the Massachusetts corporation was named as a defendant but never has been served with process except by publication under the statutes of such other State and never has appeared in the suit, if a decree pro confesso is entered against the Massachusetts corporation in the court of the other State, the rights of the Massachusetts corporation are in no way affected by such decree; and therefore the beneficiaries named in a benefit certificate, issued by the Massachusetts corporation to one of its members, who were not parties to the suit in the other State, are in no way bound by any decision or decree made in that suit, even if they would have been sufficiently represented by the Massachusetts corporation to be bound by such a decree in case that corporation had become subject to or voluntarily had submitted itself to the jurisdiction of the court of the other State. Timberlake v. Order of the Golden Cross, 411.

See also Equity Jurisdiction, 1, 2.

RULE AGAINST PERPETUITIES.

Appointment to issue of donor of power, which was not too remote because property was to vest on death of donee of power, see DEVISE AND LEGACY, 11.

RULES OF COURT.

Rule 6 of Supreme Judicial Court for the Commonwealth will not permit amendment to petition to establish exceptions by addition of allegations not supported by affidavit made within twenty days after notice of refusal to allow bill, see Practice, Civil, 29.

SALE.

What constitutes Change of Title.

- 1. Where a manufacturing corporation, which as a part of its business conducts an automobile department, transfers by a bill of sale to another corporation, newly organized by the officers and stockholders of the older corporation for the purpose of accepting such transfer and of carrying on the automobile business, such of its assets as belonged to such department in return for capital stock of the new corporation which at once is distributed among the stockholders of the older corporation as a stock dividend, the transfer constitutes a sale of such assets, although there is no change in the location of the property transferred, and although a single person, acting in accordance with proper votes of the boards of directors of the respective corporations, on behalf of the older corporation delivers the bill of sale and receives for it the certificate of shares of capital stock of the new corporation, and on behalf of the new corporation receives the bill of sale and delivers therefor the certificate of shares of its capital stock, and although one provision of the bill of sale is that a settlement between the two corporations, as to what under certain of its provisions is due to or should be paid by the new corporation to the old on account of past business of the automobile department of the older corporation, is not to occur until a future time; and therefore in accordance with the requirements of St. 1903, c. 473, § 2, an automobile which was included in the assets so transferred and had been registered by the older corporation by a manufacturer's number, should be registered again by the new corporation, and any one using or riding in it upon the highway before it is again registered is using the highway unlawfully and cannot recover for injuries resulting from ordinary negligence of third persons. Chase v. New York Central & Hudson River Railroad, 187.
- 2. At the trial of an action in which a material question was, whether on a certain day one corporation had sold an automobile to another, all the books, papers and corporate records bearing upon the question were in evidence and were undisputed. The grantee corporation had been organized to take over the property and business of an automobile department of the grantor corporation, which manufactured firearms and machinery. The plaintiff was at the same time the president of both corporations. From the documentary evidence it appeared that a bill of sale of property including the automobile had been executed by the plaintiff by authority of a vote of the board of directors of the grantor corporation and later had been approved and that stock had been issued therefor by the board of directors of the grantee corporation. There was a provision in the bill of

sale giving the grantee corporation the rights of the grantor corporation in all accounts of its automobile department at the date of the sale and that the grantee corporation should assume all the debts of the business at that date, and a further provision that at a date later than that of the bill of sale an accounting should be had and the balance adjusted as between the corporations. The plaintiff testified that he handed the bill of sale to his bookkeeper and told him to keep it until the time when the accounting should be had and then to turn it over to the grantee corporation. Held, that such testimony was not competent to show that the contract of sale did not take effect when the shares of stock of the grantee corporation were issued and delivered for it. Chase v. New York Central & Hudson River Railroad, 187.

- 8. At the trial of an action in which a material question was, whether on a certain day one corporation had sold an automobile to another, all the books, papers and corporate records bearing upon the question were in evidence and were undisputed. The grantee corporation had been organized to take over the property and business of an automobile department of the grantor corporation, which manufactured firearms and machinery. plaintiff was at the same time the president of both corporations. From the documentary evidence it appeared that a bill of sale of property including the automobile had been executed by the plaintiff by authority of a vote of the board of directors of the grantor corporation and later had been approved and that stock had been issued therefor by the board of directors of the grantee corporation. There was a provision in the bill of sale giving the grantee corporation the rights of the grantor corporation in all accounts of its automobile department at the date of the sale and that the grantee corporation should assume all the debts of the business at that date, and a further provision that at a later date an accounting should be had and the balance adjusted as between the corporations. The recording officer of the board of directors of the grantee corporation testified that at the meeting of that board at which the bill of sale was approved and stock was authorized to be issued therefor, the plaintiff had said "that the bill of sale would be held by" the grantor corporation "until the" time for the accounting and "at that time the books would be balanced and the bill of sale turned over to the" grantee corporation, and that "the directors said that would be all right." There was a formal record of the meeting which contained no mention of such action. Held, that, aside from the question whether action of the board could be proved by oral evidence under the circumstances, the testimony had no tendency to prove that the title to the automobile had not passed before the date of accounting, and could only be interpreted as referring to the complete surrender of the books and papers when the balances had been made upon the books, as contemplated by the bill of sale, after the instrument had taken effect and the property had passed. Ibid.
- 4. Under the provision of the sales act, St. 1908, c. 237, §19, Rule 2, which does not change the common law, where a manufacturer of machines agrees in writing to sell twelve specific machines complete, and delivers six of them complete, retaining in his shop the remaining six in an incomplete

condition for the purpose of completing them for delivery, the title to the six machines remaining in the shop does not pass to the buyer until they are completed, and if before completion they are damaged by fire the loss falls upon the seller. Automatic Time Table Advertising Co. v. Automatic Time Table Co. 252.

5. Where by the statements in a bill of exceptions it appears that there was a contract to sell upon their completion specific goods which at the time of making the contract were incomplete, and that before the completion of the goods they were "greatly damaged" by fire, this does not bring the case within the provision of the sales act, St. 1908, c. 237, § 8, cl. 2, which applies only where the specific goods after the contract is made either perish or "so deteriorate in quality as to be substantially changed in character." Ibid.

Construction of Terms of Sale.

- 6. Where, at the trial of an action of contract brought by a purchaser of certain mackerel against the seller for damages caused by an alleged failure of the defendant to deliver what the contract of sale called for, it appears from correspondence between the parties that the contract was for the purchase of three hundred and ninety-one barrels of large, medium and small mackerel, three hundred and fifty barrels of which had been seen and partially examined by an agent for the purchaser, the plaintiff may show that the custom in the fish trade "is, when a party purchases a lot of mackerel he is supposed to receive clean fish" and not "rusty" fish. Procter v. Atlantic Fish Companies, 351.
- 7. Where, at the trial of an action of contract by a purchaser of mackerel against the seller for damages caused by an alleged failure of the defendant to deliver what the contract of sale called for, it appears from correspondence between the parties that the contract was for the purchase of three hundred and ninety-one barrels of clean mackerel, three hundred and fifty of which had been seen and partially examined by an agent for the purchaser, the plaintiff may show that the custom in the fish trade is that, when a purchaser finds that fish purchased as clean are "rusty," the purchaser "is entitled to cull out the rusty fish and have an allowance of half price for the rusties." Ibid.
- 8. A purchaser availing himself of a custom, which became a part of a contract of sale to him of "clean" mackerel, that if the purchaser finds that the fish delivered to him "are rusty fish he is entitled to cull out the rusty fish and have an allowance of half price for the rusties," must bear the expense of the culling out; and, if the fish were delivered to him in Boston and, under the circumstances, in order to make them salable except as "rusty" mackerel, it was necessary to re-sort and repack them, which could not be done economically in Boston, the purchaser in order to avail himself of the custom must bear the expense of transporting the fish to a place where they could be re-sorted and repacked economically as well as the expense of such re-sorting and repacking. *Ibid*.
- Certain rulings as to failure to call material witness and certain charge of judge at trial of action for purchase price of coal, where manner in which

book charges were made by seller was of importance but was not conclusive, see Practice, Civil, 21; EVIDENCE, 19.

Mortgagee of real estate is not estopped, by recital in affidavit of sale at foreclosure that property was sold for \$12,500, from showing in action upon note for balance alleged still to be due, that property was sold for \$10,000, see MORTGAGE, 3.

Warranty.

- 9. In the sale of specific goods as goods of a specified description, the description amounts to a warranty that the goods are as described, and the mere fact that the specific goods were open to inspection and were in fact inspected by the purchaser does not deprive him of his right to rely on such a description as a warranty if the difference between the specific goods and the description of them would not have been and was not detected on the inspection. Procter v. Atlantic Fish Companies, 351.
- 10. At the trial of an action of contract by a buyer against the seller of mackerel, where it appears that many of the mackerel, which were purchased as clean, were "rusty" and the defendant contends that before the purchase an agent of the plaintiff made such an examination of the mackerel as to preclude the plaintiff from maintaining the action, testimony of the agent that he would have made a further examination if he had not been told that the mackerel were sold to a third person, is competent as tending to show that he did not make a thorough examination. *Ibid*.
- 11. At the trial of an action by a buyer against the seller of a large number of barrels of mackerel, where the plaintiff contends and introduces evidence tending to show that the custom of the fish trade is that, "when a party purchases a lot of mackerel he is supposed to receive clean fish," and that the fish delivered to him by the defendant were not clean but "rusty," the presiding judge properly may refuse to rule that "a warranty as to quality or condition of the mackerel cannot be implied into this case by evidence of custom or usage," since the ruling is not applicable to the case, the custom tending to prove, not that clean mackerel and "rusty" mackerel are in the trade different qualities of the same grade of mackerel, but that they are different grades of mackerel. Dickinson v. Gay, 7 Allen, 29, distinguished and commented on. *Ibid.*

Action for Price.

- 12. In an action for the price of goods sold, where on the undisputed evidence it appears that there was a completed sale and that the title to the goods passed to the defendant, and the only question is whether the price was payable in money or in goods, on which the evidence is conflicting, it is right for the presiding judge to refuse to instruct the jury that they must find for the defendant. Cobb, Bates & Yerxa Co. v. Hills, 270.
- 13. In an action for the price of goods sold and delivered, where there is no dispute as to the amount finally agreed upon by the parties as the price and the only question is whether that price was to be paid in money or in other goods, it is proper to exclude as immaterial evidence that the defend-

ant offered to the plaintiff's broker or to other persons a price less than that which he ultimately agreed to pay. Cobb, Bates & Yerxa Co. v. Hills, 270.

14. In an action for the price of goods sold, where on the undisputed evidence it appears that the title to the goods had passed to the defendant and the only question on conflicting evidence is, whether the price was to be paid in money or in other goods to be selected by the plaintiff from the defendant's stock on hand, which the plaintiff had not done, if the presiding judge instructs the jury that if the payment was to be made in merchandise the plaintiff cannot recover, the defendant cannot be harmed by the exclusion of evidence offered by him to prove the prices at which he was selling his own goods. Ibid.

SALES ACT.

See SALE, 4, 5.

SEPARATE SUPPORT.

See Husband and Wife, 1-4.

SET-OFF.

- 1. In an action against two defendants upon a joint and several promissory note signed by both of them as makers, the defendants cannot claim a set-off for services severally rendered by them to the plaintiff for which nothing is due to them jointly. *McGuinness* v. *Kyle*, 443.
- Plea in abatement in action of contract, alleging that another action was pending in which plaintiff was defendant and was setting up same claim in declaration in set-off, and proper action of court upon such plea, see Practice, Civil, 1-4.

SHIP.

Suit in equity by trustee in bankruptcy of owner of vessel against assignees of mortgage of vessel, who had taken possession of her under assumed fore-closure which was fraudulent and void, in which plaintiff sought accounting and redemption, see Equity Jurisdiction, 5-7.

SIDEWALK.

Sidewalk assessment in Brockton which was held to be invalid because of defect in order of board of aldermen with regard thereto, see Tax, 5.

SMALL LOANS ACT.

1. R. L. c. 102, § 51, provides that "a loan of less than one thousand dollars shall be discharged upon payment or tender by the debtor of the principal sum actually borrowed and interest at the rate of eighteen per cent per annum from the time said money was borrowed and a sum not exceeding five dollars for the actual expenses of making and securing the loan; but the

lender shall be entitled to interest for six months at said rate if the debt is paid before the expiration of that period. All payments in excess of said rate shall be applied to the discharge of the principal, and the borrower shall be obliged to pay or tender only the balance of the principal and interest, at said rate, due after such application." Held, that these provisions do not render it illegal for a lender to ask for and receive interest on a loan of less than \$1,000 at a rate greater than eighteen per cent. Spofford v. State Loan Co. 84.

- 2. If one, who had borrowed \$405 and had given therefor his note bearing interest at four per cent per month and a mortgage on his household furniture as security, is unable to pay the note when it comes due and the lender insists upon foreclosing the mortgage unless the borrower will execute and deliver a new note payable in one month for the amount due on the former note, bearing interest at the same rate and secured by a new mortgage on the furniture, and also a release of all demands and particularly of all rights under R. L. c. 102, §§ 51, 52, and the borrower accedes to the lender's requirements, such release, note and mortgage are valid, and although, in a series of such transactions the borrower may have paid to the lender a sum far in excess of the amount of the original loan plus eighteen per cent interest per year, and there still are outstanding a mortgage and mortgage note for \$335 and interest at four per cent per month, the borrower cannot insist under R. L. c. 102, § 51, that all payments made under all the notes in excess of the rate of eighteen per cent per year "shall be applied to the discharge of the principal," since all the mortgages but the last were transactions which were closed by the releases, and therefore the borrower only can insist upon the statute being applied to the last mortgage. Ibid.
- 8. R. L. c. 102, § 51, provides that "a loan of less than one thousand dollars shall be discharged upon payment or tender by the debtor of the principal sum actually borrowed and interest at the rate of eighteen percent per annum from the time said money was borrowed and a sum not exceeding five dollars for the actual expenses of making and securing the loan; but the lender shall be entitled to interest for six months at said rate if the debt is paid before the expiration of that period. All payments in excess of said rate shall be applied to the discharge of the principal, and the borrower shall be obliged to pay or tender only the balance of the principal and interest, at said rate, due after such application." Held, that the statute was intended for the benefit of the borrower, who may if he chooses relinquish any rights that at any time may have accrued to him under its provisions. Ibid.

SNOW AND ICE.

See Nuisance, 1, 2; Landlord and Tenant, 8.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 779.

STREET RAILWAY.

Actions against street railway companies for personal injuries or death alleged to have been caused by negligence or gross negligence of themselves or of their servants or agents, see Negligence, 29-41.

Whether street railway company is liable to fireman, travelling free upon car by permission of company, who was riding in place not permitted by company's rules and was injured in collision caused by negligence of company's servants and agents, see Negligence, 82-84.

STRIKE.

Strike by labor union which was held to be for unjustifiable cause and therefore subject to being enjoined in suit in equity, see LABOR AND LABOR UNION, 1-3.

SUCCESSIONS.

Tax on successions and inheritances, see Tax, 4.

SUPERIOR COURT.

- 1. The Superior Court as created by St. 1859, c. 196, possessed, as to the subjects within its original jurisdiction, the powers which the Court of Kings Bench, the Court of Common Pleas and the Court of Exchequer had at common law in England in 1699, and such as had become a part of our body of common law before our separation from England, as well as those powers expressly conferred upon it by statute. Crocker v. Justices of the Superior Court, 162.
- Order of judge of Superior Court in denying motions for change of venue in criminal case, which was interpreted as refusal of court to act at all on motions, and therefore gave basis for remedy of mandamus, see MANDAMUS, 1.
- Power of Superior Court on appeal from order of Probate Court upon petition under R. L. c. 158, § 85, and c. 152, § 81, to enforce previous order of robate Court that husband should pay certain sum monthly to wife for her support, see Husband and Wife, 4.
- Superior Court has power to order change of place of trial of person charged with felony, when satisfied that fair and impartial trial cannot be had in county where venue is laid in indictment; but power should be exercised with great caution, see Practice, Criminal, 1, 8.

Proceedings in such case, see PRACTICE, CRIMINAL, 2.

SUPREME JUDICIAL COURT.

Rule 6 of Supreme Judicial Court for the Commonwealth will not permit amendment to petition to establish exceptions by addition of allegations Supreme Judicial Court (continued).

not supported by affidavit made within twenty days after notice of refusal to allow bill, see Practice, Civil., 29.

Full court may grant leave to parties to exhibit further evidence, under R. L. c. 159, § 24, only in cases before it upon appeal and not in cases before it upon exceptions, see PRACTICE, CIVIL, 47.

Whether under c. 8, art. 2, of Constitution, opinion of justices of Supreme Judicial Court must be given with regard to questions relating to elementary rules of law, see Constitutional Law, 14.

Question, whether previous act of Legislature had been passed over veto of Governor, was not proper one for House of Representatives to submit to Supreme Judicial Court under constitution of Massachusetts, c. 3, art. 2, see Constitutional Law, 15.

SURETY.

- 1. Where a bond to dissolve an attachment has been given for the penal sum of \$500, and the ad damnum of the writ in the action in which the attachment was made is only \$300, a surety on the bond is not released from liability by an amendment of the writ after the execution of the bond increasing the ad damnum to \$500, the penal sum of the bond. McNeilly v. Driscoll, 293.
- When notice to guarantor of breach of guaranteed contract is necessary to cause guarantor to be liable, see Guaranty, 5.
- No notice, of acceptance of certain contract for sale of merchandise, which had been signed by guarantors before delivery to seller, was held to be necessary from seller to guarantors in order to bind guarantors, see . Guaranty, 2.
- No notice, by seller to guarantors guaranteeing performance by purchaser of contract of purchase of bottles, of breach of contract by purchaser was held to be necessary under circumstances in order to cause guarantors to be liable on their contract of guaranty, see Guaranty, 5, 6.
- Acts of manager of glass manufacturing corporation as to contract for manufacture and sale of bottles, payment of price of which was to be guaranteed by certain individuals, which, when ratified by corporation, together with delivery to such manager of contract signed by guarantors, were sufficient to constitute contract of guaranty, see Guaranty, 1.
- Surety on certain bond given under R. L. c. 6, § 77, as security for payment by contractor for labor performed and for materials used in construction of public work under contract with Commonwealth, was held not to have right under circumstances to insist that payment from Commonwealth of funds reserved by it should be applied wholly to payment of claims secured by bond, see Equity Jurisdiction, 17.

TAX.

Must be Proportional.

Tax upon property must be proportional, see Constitutional Law, 12.

Assessment.

- Whether a city or town can tax real estate owned by itself, unless by assessment under such a specific provision as that contained in St. 1909, c. 490, Part II. § 67, in regard to land taken or purchased for non-payment of previous taxes, here was referred to as a question which was not passed upon. Burr v. Boston, 587.
- 2. The holders of transferable certificates representing shares in personal property, which is held and managed by trustees, without incorporation, although the trust agreement provides that neither the shareholders nor the trustees shall be liable personally for the debts of the trust, are partners within the meaning of R. L. c. 12, § 27, (St. 1909, c. 490, Part I. § 27,) and are to be taxed as such shareholders jointly under the partnership name in the place where the business of the partnership is carried on. Consequently they are not to be treated for purposes of taxation merely as cestuis que trust, whose interests would be assessed under R. L. c. 12, § 23, cl. 5, (St. 1909, c. 490, Part I. § 23, cl. 5,) in the different places where they resided, if within the Commonwealth. Williams v. Boston, 497.
- 8. R. L. c. 12, § 50, re-enacted in St. 1909, c. 490, Part I. § 49, is as follows: "After personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors . . ." Held, that there is nothing in this statute to prevent an assessment for a larger amount than that last assessed upon the property, if the executor, administrator or trustee has such larger amount in his possession. Blackie v. Boston, 188.
- There is no jurisdiction in equity to determine validity of assessment of tax, see Equity Jurisdiction, 18.
- Assessment upon interest in real estate which was being purchased by instalments and title to which was not to pass until all instalments were paid, or upon amounts thus paid in instalments, which was held to be illegal, see post, 7.
- Neither assessors nor collector of taxes of city or town nor inhabitants of town nor city council of city have power to consent to proceedings in equity to determine validity of tax assessed by assessors of town or city, see Municipal Corporations, 2, 3.

Excise.

Legislature cannot impose excise tax on mere ownership or possession of personal property of every kind, see Constitutional Law, 11.

On Successions and Inheritances.

4. The limitation of the exemption from the imposition of a succession tax upon bequests to "a city or town for public purposes" to bequests for such purposes to "a city or town within this Commonwealth," which

existed before the enactment of St. 1909, c. 527, § 1, was not changed by that statute, which is merely declaratory of the previous statutes on the subject. Davis v. Treasurer & Receiver General, 848.

Sideroalk Assessment.

5. The board of aldermen of the city of Brockton, which had accepted the provisions of R. L. c. 49, 44 42-44, relative to the establishment of grades for and to the construction of sidewalks, "if in their judgment the public convenience so requires," and to the assessment of one half of the cost thereof upon the abutters, adopted the following order which was approved by the mayor: "Ordered, that the superintendent of streets be and he is hereby directed to lay and construct a granolithic sidewalk in front of" certain estates "and report to the board a schedule of the cost thereon." After the construction of the sidewalk, an abutter was assessed for one half the cost of so much as was constructed in front of his premises. Held, that, because of the omission from the order of the board of aldermen of a statement that in their judgment public convenience required the building of the sidewalk, it was not apparent whether the order was made under R. L. c. 49, § 44, or was an order for specific repairs, which the board had power to make under R. L. c. 48, § 65, St. c. 1881, c. 192, § 1; and therefore that the order could not be made the foundation of an assessment. Borden v. Brockton, 348.

Exemption.

6. Real estate in a city, which is held by that city in trust to apply the income thereof to the maintenance and improvement of its common and parks, is held upon a valid public charitable trust and for that reason is not subject to taxation. Burr v. Boston, 587.

Abatement.

7. On an appeal under St. 1909, c. 490, Part I. § 76, from a refusal of the assessors of a city to abate a tax, it appeared that the petitioners were the trustees of a real estate trust represented by shares, who seven years before the assessment of the tax had made a contract for the purchase of certain real estate from a museum corporation, and that the tax of which an abatement was sought was upon \$1,500,000, which had been advanced to the museum corporation by the petitioners in part payments under the terms of the contract. It was provided in the contract that the petitioners should not receive the title to the real estate until all of the purchase money had been paid, and that in the final adjustment of payments between the parties the museum corporation should pay interest on all sums thus received by it at the rate of four and one quarter per cent per annum. At the time of the assessment the title to the property was still in the museum corporation. It was contended by the respondent that the advance payments in the hands of the museum corporation at the time of the assessment were loans from the petitioners which were taxable to them as "money at interest." Held, that the part payments when made became the property of the museum corporation, and that the fact that interest was to be allowed on them from the time of each payment did not convert them into loans; so that they could not be taxed to the petitioners and the attempted tax on them should be abated. Williams v. Boston, 497.

- The remedies given by R. L. c. 12, §§ 77, 78, to a person aggrieved by the refusal of the assessors of a town to abate a tax are constitutional. Sears v. Assessors of Nahant, 208.
- A writ of certiorari will not be issued directed to the assessors of a town for the purpose of revising and correcting errors of law alleged to have been made by them in refusing to abate a tax. Ibid.
- 10. A writ of mandamus will not lie to command the assessors of a town to change their decision refusing to abate a tax. Ibid.

TENDER.

Insistence, by person agreeing to purchase land "free from all incumbrances," upon absolute guaranty that there would be no trouble to him later because of existence of certain bond, was held to dispense with necessity of tender of deed by seller before bringing of suit for specific performance of contract to purchase, see Contract, 16.

Refusal to accept bank check tendered in payment of account and bringing of action for amount of account were held not to amount to rescission of contract, and return of check or tender of it was not necessary condition precedent to bringing of action, see CONTRACT, 14.

TOWNS AND CITIES.

See MUNICIPAL CORPORATIONS.

TRESPASS.

Driver of caravan was held not to have been guilty of wanton or reckless misconduct because horses started after he had warned trespassing boy to get off from caravan and before boy had done so, see NEGLIGENCE, 67.

TRUST.

What constitutes.

Where chemist delivered to partnership certain secret formulas for them to manufacture and put upon market compounds made in accordance with formulas and to pay to him "fair and equitable share" of net profits, and partnership forms itself into corporation which takes over manufacture of formulas, partnership and corporation both are subject to trust under which formulas were delivered to partnership, see Equity Jurisdiction. 8.

As to real estate trust, see Tax, 2. As to resulting trust, see post, 7.

Validity.

1. If a married woman conveys certain property to trustees, directing among other things that on her death the property should be divided "precisely as if" she "had then died unmarried, intestate and possessed of said property in her own right," and four years later procures a divorce from her husband and a year later marries again, such conveyance is not void as in fraud of the second husband's marital rights. Chase v. Phillips, 245.

Trust which was held not to be void as in violation of rule against perpetuities, see DEVISE AND LEGACY, 11.

Construction.

- 2. A married woman conveyed certain property to trustees by a deed which contained, among directions as to the disposition of the property upon her death, the following: "it being distinctly understood that [her husband] is not to be included among her heirs-at-law, and that neither he nor his legal representatives are to receive upon [her] death any portion of said trust property, which upon her death is to be divided precisely as if [ahe] had then died unmarried, intestate and possessed of said property in her own right." Four years after the conveyance she procured a divorce and a year later married another man, who, upon her death, claimed a right under the trust as an heir at law, contending that the words "died unmarried," should be construed to mean "died unmarried to her first husband." Held, that the words should be given their natural meaning and that therefore the second husband had no rights in the trust fund. Chase v. Phillips, 245.
- 8. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of " each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, a second survived the testator but died before the debts of the estate were paid; and the third, after the debts of the estate were paid but before the accumulation of one seventh of the profits of the business equalled one seventh of the appraised value of the business, demanded a transfer of a one seventh interest in the business. Held, that no such transfer should be made. Hale v. Herring, 819.

- Trust (continued).
- 4. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, and a second survived the testator but died before the debts of the estate were paid. Held, that neither the first nor the estate of the second of such two beneficiaries was entitled to any share of the business or of its profits. Hale v. Herring, 319.
- 5. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of" each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits then credited to his account. . . . All book accounts, stock, &c., appertaining to said business are to be included in the appraisal of it, subject to the payment of my debts, which are to be first paid from said business." Held, that the son and the daughter were not entitled to draw anything from the profits of the business until the debts were paid. Ibid.
- 6. A clause in a will directed the executor in substance to carry on the testator's business as the testator previously had carried it on, that one seventh of the profits of each year's business should "be credited to the account of "each of five persons, one of whom was a son and one a daughter of the testator, and to pay one seventh of the annual profits each to the son and the daughter; that the amounts credited in the accounts specified should be allowed to accumulate until the accumulation in each account should equal one seventh of the appraised value of the business, when each of the three persons other than the son and the daughter should receive a one seventh undivided interest in the business "provided that, if either of said parties should die or desire to retire from said business, he or his executors or administrators shall be entitled to draw the amount of profits

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then credited to his account. I direct my said executors to invest any surplus profits not needed in said business for the benefit of said parties in some safe and secure manner. All book accounts, stock, &c., appertaining to said business are to be included in the appraisal of it, subject to the payment of my debts, which are to be first paid from said business." The son and the daughter survived the testator. One of the other three persons designated ceased to be connected with the business before the testator's death, a second survived the testator but died before the debts of the estate were paid. The third remained in the business. On a bill by the executor for instructions as to how the profits should be credited and in what manner the accounts should be kept, it was held, that debts of the testator first should be paid, that thereafter five accounts should be kept. each of which should be credited each year with a one seventh part of the profits until the last of the three persons other than the son and daughter dies or retires from the business, or until the amount so credited to his account equals one seventh of the appraised value of the business. Upon the happening of either of those contingencies and the conveyance to him of one seventh part or interest in the business or the drawing out by him or by his estate of the amount of profits credited to his account, the trust will terminate. In the meantime, if the shares of the income to be credited as aforesaid are not needed in the business, they must be invested, in accordance with the direction of the testator, in some safe and secure manner for the benefit of the parties interested. Hale v. Herring, 319. Construction of provision of will directing that, on termination of certain trust, property should be given to testator's "heirs," where natural meaning of word was held to have been intended, see DEVISE AND LEGACY,

Limitation over of property on termination of certain trust construed to be to certain persons only in case daughter of testator's niece should die without issue living at her death, see DEVISE AND LEGACY, 6, 10.

Resulting.

7. In a suit in equity to compel the defendant to convey to the plaintiff certain land which the defendant was alleged to have purchased with money of the plaintiff under an agreement that he should convey it to the plaintiff, it appeared that, for the purchase of the land, unincumbered, at a sale in foreclosure of a mortgage, the defendant had agreed orally to lend to the plaintiff \$1,000, which was the amount which was required to be paid at the time of the sale, and to purchase the land for the plaintiff and then to convey it to the plaintiff, who, by arrangement with the mortgages, would give him a first mortgage back for the balance of the purchase price and then give to the defendant a second mortgage to secure the advance of the \$1,000 and certain other advances to be made by him and debts due from the plaintiff to him and others; that at the foreclosure sale the defendant was the highest bidder and purchased the land for \$28,200, paid the \$1,000 required as an immediate payment, at a later date by arrangement with the mortgagee gave back a mortgage for

\$28,000 to a nominee of the mortgagee for the remainder of the purchase price, and thereafter refused to carry out his oral agreement with the plaintiff. *Held*, that the suit must be dismissed, because the purchase price was not all paid by the plaintiff and therefore there was no resulting trust, and the statute of frauds prevented the enforcement of the oral agreement. *Kennerson* v. *Nash*, 898.

Real Estate Trust.

Holders of transferable certificates representing shares in personal property, held and managed by trustee without incorporation, are partners and are to be taxed as shareholders jointly under partnership name in place where business is carried on, and are not to be treated for purposes of taxation merely as cestuis que trust, to be assessed at places of individual residence, see Tax, 2.

TRUSTEE PROCESS.

Provision of R. L. c. 167, § 112, as to death of debtor dissolving attachment under certain circumstances, applies to attachment by trustee process, made upon petition for execution to enforce decree for alimony or separate maintenance, of property alleged to have been conveyed or concealed fraudulently by debtor, see Attachment, 4.

UNLAWFUL INTERFERENCE.

Unlawful interference by labor union with contract may be enjoined by suit in equity, see LABOR AND LABOR UNION, 3; EQUITY JURISDICTION, 18.

USAGE.

See Custom.

VARIANCE.

See PAYMENT, 1.

VENUE.

Order of judge of Superior Court in denying motions for change of venue in criminal case, which was interpreted as refusal of court to act at all on motions and to give basis for remedy of mandamus, see Mandamus, 1.

Superior Court has power to order change of place of trial of person charged with felony, when satisfied that fair and impartial trial cannot be had in county where venue is laid in indictment; but power should be exercised with great caution, see Practice, Criminal, 1, 3.

Proceedings in such case, see PRACTICE, CRIMINAL, 2.

VERDICT.

Setting saids of verdict, see Practice, Civil, 26.

Ordering of verdict, see Practice, Civil, 23, 24; Evidence, 8; Landlord and Tenant, 4; Railboad, 8, 5; Sale, 12.

WAGERING CONTRACT.

Certain proposed statute making it criminal offense to engage in gift enterprise would be unconstitutional, in opinion of justices, see Constitu-TIONAL LAW, 5.

Action of tort for damages resulting from plaintiff's relying on false and fraudulent representation by defendants that corporation, of which they were officers and agents, was engaged in legitimate stock brokerage business, whereas it was conducting business in wagering contracts, where defendants were not allowed to rely on releases executed by plaintiff in closing certain transactions with corporation, in which he covenanted not to sue it or any of its "principals, stockholders, officers, agents or servants," see False Representations, 1.

WAIVER.

 If a person arrested is discharged upon his voluntary request to be freed from arrest without arraignment, he waives any claim for damages which he otherwise might have had against the officer who arrested him. Horgan v. Boston Elevated Railway, 287.

Neither assessors nor collector of taxes of city or town nor inhabitants of town nor city council of city have power to consent to proceedings in equity to determine validity of tax assessed by assessors of town or city, see MUNICIPAL CORPORATIONS, 2, 8.

Insistence, by person agreeing to purchase land "free from all incumbrances," upon absolute guaranty that there would be no trouble to him later because of existence of certain bond, was held to dispense with necessity of tender of deed by seller before bringing of suit for specific performance of contract to purchase, see CONTRACT, 16.

Conductor of street railway corporation has no authority to waive on its behalf certain rules as to where fireman, travelling free upon car, shall ride, see Negligence, 34.

Attorney at law for person agreeing to sell land, who, with consent of client, acted for purchaser in examination of title, was held under circumstances to have waived for purchaser requirement that papers should be passed at certain time and place although contract of sale provided that any change of time and place must be by agreement in writing between parties, see CONTRACT, 15.

WARRANTY.

See SALE, 9-11.

WAY.

Private.

 In a suit in equity by the owner of an apartment hotel adjoining on its rear an alleyway sixteen feet wide, against the owner of another apartment hotel also adjoining on its rear the same alleyway, the plaintiff sought to restrain the defendant from maintaining coal bins under the

- passageway. It appeared that the plaintiff had acquired by his deed an easement in the passageway and that it was "always to be kept open to its full width for the benefit of the abutters thereon for the purposes of light, way, drainage and the like." It appeared also that before the first of the deeds creating the easement in the passageway was made the city had laid out and constructed a public sewer through the whole length of the passageway and that all the buildings on the passageway drained into this sewer. Held, that, if the word "drainage" in the description of the easement in the deed included anything more than surface drainage, it referred merely to drainage into and through the public sewer, that the easement included no right to have the land beneath the surface of the passageway remain unused, and that the plaintiff could not prevent the defendant from constructing and maintaining on his own land under the passageway a coal bin which did no damage to the plaintiff. Kendall v. Hardy, 20.
- 2. In a suit in equity by the owner of an equity of redemption of an apartment hotel adjoining on its rear an alleyway sixteen feet wide, against the owner of another apartment hotel also adjoining on its rear the same alleyway, to compel the removal by the defendant of certain bay windows projecting over the passageway, it appeared that the plaintiff had acquired by his deed an easement in the passageway sixteen feet wide back of the two buildings and that it was "always to be kept open to its full width for the benefit of the abutters thereon for the purposes of light, way, drainage and the like," that the defendant had constructed four horizontal rows of bay windows, the lowest of which started at a height of from eighteen to twenty-one feet above the surface of the passageway, that when the windows were constructed the plaintiff was not the owner of his property and that he did not acquire his title to it until a considerable time after the construction of the windows, that the nearest bay window on the defendant's building was about one hundred and twenty feet from the plaintiff's building, that the defendant's bay windows did not affect the light of the plaintiff's building, and did not noticeably diminish the light which came to persons travelling on the passageway. All the abutters on the passageway other than the plaintiff had agreed to the maintenance of the defendant's bay windows. When the defendant's bay windows were constructed the plaintiff had a moral right to redeem the property. which afterwards became his, by reason of an oral agreement that could not be enforced, and a mortgagee in possession, who then was the owner of the property, assured the defendant that he should not object to the windows personally and told him that the plaintiff was not likely ever to acquire any legal right to the property. Held, that equity did not require the enforcement of the plaintiff's technical right by a mandatory injunction, and that he was entitled only to his legal right to nominal damages. Ibid.

Public.

Abutter's rights to have way open for light and air.

The owner of real estate abutting on a public street has the right to have the street open for light and air so long as there are no uses affecting his enjoyment of light and air to which the public desire to put the street under their easement for purposes of travel and communication. If the Legislature in behalf of the public impose an additional burden on the property of the abutter for a different kind of public use, which will interfere with his enjoyment of light and air by the erection of structures upon or over his land within the limits of the street, he is entitled to compensation. Opinion of the Justices, 608.

Structures above highways.

Power of Legislature to authorize cities and towns or boards of public officers to issue permit or license for construction and maintenance of bridge over public street, see Constitutional Law, 4, 8.

Power of Legislature regarding bridges or structures above streets or highways, and rights under certain circumstances of owners of adjacent land, see ante, 8; Constitutional Law, 2, 6, 7; Easement, 1.

Fireworks upon highway.

Town, which, exclusively for gratuitous amusement of public, undertakes celebration of fourth day of July under statutory authority, is not liable, as for maintenance of nuisance or in any other way, to one injured because of negligent way in which fireworks are discharged in such celebration, see Fireworks, 1-8.

Negligence in use of highway.

See NEGLIGENCE, 47-59.

Maintenance of dangerous thing near highway.

See NEGLIGENCE, 60, 61.

Grade crossing of railroad with highway.

Statutes requiring signals by locomotive engines approaching crossings at grade of railroads with public ways are intended only for protection of persons rightfully upon such ways, see RAILROAD, 1.

Automobiles upon highways.

One driving or being transported in automobile which is not registered according to statutory requirements has not rights of traveller lawfully upon public way, see AUTOMOBILE, 1.

Certain acts of directors and of certain officers of two corporations, which were held to constitute sale by one corporation to other of automobile so that, upon vendee corporation using automobile without again registering it, persons in it became trespassers upon highway and not entitled to recover for injuries resulting from ordinary negligence of third persons, see SALE, 1-3; EVIDENCE, 9; RAILEOAD, 1; AUTOMOBILE, 1, 2.

Defect.

- 4. It is an elementary rule of law that cities and towns are liable to travellers on their highways for injuries caused by unsafe conditions only so far as such liability is imposed by statute. Opinion of the Justices, 625.
- If a city, while constructing a trench in the highway beneath the tracks of a street railway, does not close the street to travel and relies on an em-

- ployee of the corporation operating the street railway to warn travellers against falling into the trench and to keep it properly guarded, the city is liable under R. L. c. 51, § 18, to a traveller who is injured from falling into the trench by reason of a failure of the employee of the street railway company to do his duty. O'Neil v. Chelsea, 307.
- 6. At the trial of an action under R. L. c. 51, § 18, by a traveller against a city for personal injuries caused by the plaintiff falling into a trench dug by the defendant in a public street, there was evidence tending to show that the defendant had not closed the street to public travel, that for several days it had been excavating the trench along a street through which the plaintiff passed daily, that the plaintiff had observed that as the work progressed the trench approached street railway tracks on an intersecting street, and that on the morning of the accident he noticed that it was dangerous to walk between the ditch and the tracks; that during the day of the accident the trench had been dug under the street railway tracks, that lights and barriers had been placed to warn persons approaching from every direction, that a barrier had been placed across the tracks where the trench was and that an employee of the street railway company had been left on guard to remove and replace the barrier for the passing of cars and to warn travellers on the street. It did not appear whether there was any arrangement between the city and the street railway company as to the guard's employment. The plaintiff returned from work early in a December evening in a street car which the guard, having removed the barrier, stopped fifteen feet before it reached the trench. The guard did not replace the barrier at once after the car had passed, but stopped to watch some travellers approaching from another street about three hundred and forty feet away. The plaintiff in the meantime had left the car and was walking behind it to reach a place where he could gain access to the sidewalk when, not seeing the trench, he fell into it. Held, that the questions, whether negligence of the plaintiff contributed to the accident, or whether the accident was caused solely by a defect arising from negligence of the watchman, for which the city was responsible, were for the jury. Ibid.
- 7. In an action against a city under R. L. c. 51, § 18, for personal injuries alleged to have been sustained by reason of a defect in a highway of the defendant, it appeared that the plaintiff in the exercise of due care was driving four horses attached to a heavily loaded wagon, when the horses were frightened by a portable engine maintained in a temporary shelter on the highway for use in the erection of a building, which was being operated negligently by the engineer of the building contractor, that the horses became uncontrollable and turned one of the wheels of the wagon into an open trench in the highway, so that the plaintiff was thrown from his seat and sustained the injuries complained of. It further appeared that the trench had been dug by the water department of the defendant, and that, after the defendant had received reasonable notice of its dangerous character, it had been left wholly unguarded without any precautions being taken to warn travellers of the danger. Held, that the action could not be maintained because the defect in the highway was not the sole cause of the plaintiff's injuries. Igo v. Cambridge, 571.

WIDOW.

See Dower, 1.

WILD LANDS.

Certain seashore lots were held not to be wild lands and to be of nature capable of being set off as dower, see Dower, 1.

WILL.

Execution.

1. An alleged testator, who in his own handwriting had written his name in the exordium clause of a printed form for a will and had filled in the rest of the blank form except in the testimonium and attestation clauses, asked three persons to see him sign his will and thereupon wrote in the date in the testimonium clause, but did not sign the document, and in his presence and in the presence of each other the witnesses subscribed their names below the attestation clause, and he left the house. Five minutes later he returned, stating, "I forgot to sign my name to my will." Thereupon, in the presence of the same three witnesses he wrote his name in a blank space in the attestation clause but nowhere else. The witnesses did not sign again. Held, that the statement of the alleged testator to the witnesses showed that he had not written his name in the exordium clause intending it to stand as his signature to the will, that the writing of his name in the testimonium clause, assuming it to have been good as a signature, was not attested by three witnesses who subscribed the will after its execution by the testator as required by our statute, and therefore that the will never was properly executed by the alleged testator. Barnes v. Chase, 490.

Construction.

Construction of, see Devise and Legacy, 1-12; Trust, 2.

Construction of codicil which referred to and incorporated part of will, see DEVISE AND LEGACY, 10.

When finding of fact or ruling of law by justice hearing suit in equity involving meaning of provision in will becomes res judicata, see Equity Junisdiction, 1.

WITNESS.

Cross-examination.

 Where a party who has called the adverse party as a witness proceeds to cross-examine him, as permitted by R. L. c. 175, § 22, the regulation of the scope to be allowed in such cross-examination, as well as the order of evidence, is within the discretionary power of the presiding judge. Cobb, Bates & Yerza Co. v. Hills, 270.

Evidence afterward may be introduced by party so examining to contradict testimony of adverse party so elicited, see EVIDENCE, 18.

- It is within discretion of judge presiding at trial to determine how many times substantially same inquiries shall be made of witness in cross-examination, see Practice, Civil, 13.
- Where plaintiff is only witness in his own behalf, and testimony given by him in direct examination would entitle him to have case go to jury, fact that in cross-examination he makes conflicting statements does not deprive him of that right, such conflict being matter for jury to weigh, see EVIDENCE, 3.

Re-direct Examination.

2. Although a witness upon his re-direct examination may be allowed to correct or modify testimony given on his cross-examination, yet the libellant in a divorce trial, where there is an issue as to condonation, properly may be refused permission to explain on his re-direct examination what he meant by the words "contemplated reconciliation" as used in his cross-examination to describe his state of mind and purpose in several meetings between him and the libellee, after a separation growing out of her misconduct and after repeated expressions of penitence and appeals for for-giveness from her, the words as used in this connection being so plain that there can be no ambiguity or uncertainty as to their significance. Brown v. Brown, 290.

Absent Witness.

Absence of material witness as evidence against party who should have called him, see EVIDENCE, 19.

WORDS.

- "A fair and equitable share." See Noble v. Joseph Burnett Co. 75, 82.
- "A term of years." See Beach & Clarridge Co. v. Am. Steam Gauge & Valve Manuf. Co. 121.
- "Charged." See Niles v. Adams, 100.
- "Died unmarried." See Chase v. Phillips, 245, 249, 251.
- "Drainage." See Kendall v. Hardy, 20, 28.
- "Fair and equitable share." See Noble v. Joseph Burnett Co. 75, 82.
- "Forthwith." See Amory v. Reliance Ins. Co. 878, 885.
- "Greatly damaged." See Automatic Time Table Advertising Co. v. Automatic Time Table Co. 252, 257.
- "Heirs at law." See Welch v. Blanchard, 523, 525.
- "Sold." See Chase v. New York, New Haven, & Hartford Railroad, 187, 156.
- "Term of years." See Beach & Clarridge Co. v. Am. Steam Gauge & Valve Manuf. Co. 121.
- "Undistributed." See Dallinger v. Morse, 501, 504.

WRIT OF ENTRY.

1. If, after the bringing of a writ of entry, the tenant surrenders possession of the land described in the writ and the demandant takes possession thereof, the writ abates and judgment must be entered for the tenant. *Mead* v. *Cutler*, 391.

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